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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 58

GENERAL LELAND S. HOBBS, POST COMMANDING OFFICER, FORT DIX, NEW JERSEY, PETITIONER

vs.

UNITED STATES EX REL. HARRY HOROWITZ

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR CERTIORARI FILED MARCH 18, 1946
CERTIORARI GRANTED MAY 27, 1946

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. —

GENERAL MADISON PEARSON, POST COMMANDING OFFICER, FORT DIX, NEW JERSEY, PETITIONER

vs.

UNITED STATES, EX REL. HARRY HOROWITZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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1 In United States District Court, District of New Jersey

Civ. Ac. 5003

IN THE MATTER OF THE APPLICATION OF HARRY HOROWITZ FOR A WRIT OF HABEAS CORPUS

Docket entries

1945

Mar. 26—Petition for Writ of Habeas Corpus, filed.
Mar. 26—Hearing on application for Writ of Habeas Corpus. Ordered Writ of Habeas Corpus to issue, (M).
Mar. 26—Writ issued, with allocatur (M).
Mar. 31—Copy of Writ of Habeas Corpus, with Marshal's return, filed.
Apr. 16—Hearing on return Writ of Habeas Corpus. Motion that the return be stricken and the writ sustained—Denied. Exception allowed. (M).
Apr. 16—Ordered Writ dismissed. Exception allowed. (M).
Apr. 16—Return on Writ of Habeas Corpus, filed.
Apr. 16—Original Writ of Habeas Corpus with allocatur, returned and filed.
Apr. 16—Traverse, filed.
May 16—Order dismissing Writ of Habeas Corpus filed on May 14, 1945 (M).
May 29—Notice of Appeal, filed. (W. & W.)
May 31—Notices sent to Thorn Lord, Esq., and to Wm. P. Rowland, Clerk, U. S. C. C. A.
June 7—Findings of Fact and Conclusions of Law, filed (M) (Writ of Habeas Corpus, denied).
June 27—Consent Order extending time to file record on appeal to 7-30-45, filed (Fk) (Copy sent to U. S. C. C. A.).
July 25—Order directing Clerk to release exhibit to U. S. Attorney, filed (S).
July 28—Consent Order extending time to file record on appeal to August 27, 1945, filed (S).
Aug. 23—Designation of Contents of Record on Appeal filed.

2 In United States District Court

[Title omitted.]

Order extending time

Filed July 27, 1945

Upon the annexed stipulation of consent by all of the attorneys for all of the parties hereto, it is hereby

Ordered, that the time of the relator-appellant herein to serve and file his record on appeal be and the same hereby is extended to the 27th day of August 1945.

Dated: July 27th, 1945.

WILLIAM F. SMITH,
Judge, United States District Court.

3 The entry of the within order extending the time of the relator-appellant to serve and file Record on Appeal in the above case is hereby consented to.

Dated: July 23, 1945.

Willner & Willner,
WILLNER & WILLNER,
Attorney for Relator-Appellant.
THORN LORD,
United States Attorney,
Attorney for Respondent-Appellee.

4 In United States District Court

[Title omitted.]

Order extending time

Filed June 27, 1945

To the Honorable District Court of the United States for the District of New Jersey.

Upon the annexed stipulation and at the request of the attorneys for all of the parties hereto, it is hereby

Ordered, that the time of the relator-appellant herein to serve and file his record on appeal be and the same hereby is extended to the 30th day of July, 1945.

Dated: June 27, 1945.

GUY L. FAKE,
Judge, United States District Court.

5 The entry of the within order extending the time of the relator-appellant to serve and file Record on Appeal in the above case is hereby consented to.

Dated: June 27, 1945.

Willner & Willner,
WILLNER & WILLNER,
Attorney for Relator-Appellant.
THORN LORD,
United States Attorney,
Attorney for Respondent-Appellee.
By VINCENT E. HULL,
Ass't. U. S. Atty.

6 In United States District Court

[Title omitted.]

Order re withdrawal of service file

Filed July 25, 1945

It appearing that the Selective Service file of Harry Horowitz, which was originally in the custody of New York Local Board 104, is now in possession of the Clerk of this Court at Newark, having been offered in evidence and accepted at the hearing on the return of the Writ of Habeas Corpus heretofore issued in this matter, and that it is in the interest of all of the parties concerned that the said Clerk deliver said file to the United States Attorney, so that he may examine it and for that purpose may retain it in his custody as long as may be necessary.

It is on this 25th day of July

Ordered that the Clerk of this Court be and hereby is directed to deliver New York Local Board 104 Selective Service file of Harry Horowitz, which is presently in his possession as an exhibit in this matter, to the United States Attorney upon receiving a proper receipt therefor.

(S) WILLIAM F. SMITH,
Judge, United States District Court.

7 In the United States District Court

[Title omitted.]

Petition for writ of habeas corpus

Filed March 26, 1945

To the Honorable District Court of the United States for the District of New Jersey;

The petition of Harry Horowitz respectfully shows that he is a citizen of the United States and a resident of the State of New York.

First. That your petitioner is respectfully applying for a writ of habeas corpus to inquire into the detention of your petitioner's son, Martin Maury Horowitz, who is now unlawfully detained and restrained of his liberty and he alleges and shows as follows:

Second. That your petitioner's son, Martin Maury Horowitz, is not committed or detained of any process or mandate issued by any Court of the United States, or by any Judge thereof; nor is he committed or detained by virtue of the final judgment or decree

of a competent tribunal of civil or criminal jurisdiction, or the final order of such a tribunal made in a special proceeding instituted for any cause except to punish him for contempt; nor by virtue of an execution or other process issued upon a judgment, decree, or final order. The cause or pretense of the imprisonment or restraint, according to the best of the knowledge and belief of your petitioner, is that petitioner's son was inducted into the service allegedly pursuant to the Selective Service Act and is now stationed at the United States Army Base, at Fort Dix, New Jersey, since February 15, 1945.

Third. The Commanding Officer of said United States Army Base where petitioner's son is now stationed is General M.
8 Pierson, Post Commanding Officer, Fort Dix, New Jersey, and the said General Pierson is the person in whose custody petitioner's son is at present.

Fourth. That the aforesaid Army Base is located in the District of New Jersey.

Fifth. That the induction of Martin Maury Horowitz, petitioner's son, into the Armed Forces of the United States was the result of an arbitrary, capricious, and illegal act on the part of Local Board No. 104 of the Selective Service System located in the Borough of Bronx, County of Bronx, City and State of New York, and was contrary to the provisions of the Selective Training and Service Act of 1940 and the rules and regulations adopted and promulgated in connection therewith, and that the said petitioner's son was illegally and improperly inducted and is therefore improperly and illegally detained by the United States Army.

Sixth. That the facts leading up to such illegal detention are as follows:

1. Petitioner's son, Martin Maury Horowitz, is a student of the ministry, bona fide as such, in good faith, in continuous attendance at a duly recognized divinity institution, attending as such for the purpose of being ordained in the Ministry as an Orthodox Jewish Rabbi.

2. That said petitioner's son, Martin Maury Horowitz, is a bona fide theological student now attending the Rabbinical Seminary of America located at 135 South 9th Street, Borough of Brooklyn, County of Kings, City and State of New York.

3. That the aforesaid Seminary was founded over ten years ago. This Seminary has been duly recognized after due investigation by the Selective Service Headquarters as a duly constituted theological or divinity school, and has been recognized as such for more
9 than one year prior to the date of the enactment of the Selective Training and Service Act (September 16, 1940); and National Selective Service Headquarters had made a predetermination of the status of the said Seminary as such, and such

predetermination was included in the list maintained at City Selective Service Headquarters.

4. That by reason thereof, and pursuant to the evidence submitted by petitioner's said son, Martin Maury Horowitz, and by virtue of Section 5, subdivision (d), of the Selective Training and Service Act, and regulation 622.44, and Local Board Memorandum No. 187 issued October 14, 1943, and as amended May 13, 1944, adopted and promulgated in connection therewith, petitioner's son was and is entitled to be classified in class IV–D.

5. That petitioner's son is 25 years of age. He was born on September 15, 1919, in the Borough of Bronx, County of Bronx, City and State of New York, and now resides at 160 South 2d Avenue, Mount Vernon, New York.

6. That for a great many years, until the time of the induction of petitioner's said son, Martin Maury Horowitz, into the Army of the United States, he had always attended schools of Hebrew learning with the sole intention to qualify for the orthodox Hebrew rabbinate and to function as a Rabbi, and that his scholastic background and continued studies were all leading to the rabbinate ordainment.

7. That after having taken the entrance examination, the petitioner's said son, Martin Maury Horowitz, was, in May, 1941, accepted as a student preparing for the rabbinate at the Rabbinical Seminary of America, the school above referred to, for admission in September 1941, the next following term, and that since September 1941 the said Martin Maury Horowitz has been a student preparing for the orthodox rabbinate at the said Rabbinical Seminary of America.

8. That your petitioner's said son, Martin Maury Horowitz, duly registered with Local Board No. 104 in the Borough of Bronx, County of Bronx, City and State of New York.

9. That thereafter on October 2, 1941 the Local Board classified the said Martin Maury Horowitz in class IV–D as a student preparing for the rabbinate.

10. That on December 2, 1943 the said Local Board continued Martin Maury Horowitz in the same classification.

11. That on April 6, 1944, Local Board No. 104, at the request of New York City Selective Service Headquarters, forwarded the file of Martin Maury Horowitz to the said headquarters which in turn referred the case to a special panel on theological classification in Selective Service Headquarters for an advisory opinion. The Panel had a hearing and recommended that the petitioner's son, Martin Maury Horowitz, be not classified in IV–D.

12. Thereafter the said Martin M. Horowitz was reclassified by the Local Board in 1A and upon appearance before the Local

Board he called the attention of the said board to the fact that no rabbi had been present at his hearing before the alleged panel on theological classifications, although the said panel was described by City Selective Service Headquarters as composed of eminent clergymen and laymen.

13. That thereupon the Local Board referred the case for an advisory opinion to a local Rabbi in the County of Bronx who after the registrant's appearance before him recommended a IV-D classification.

14. That thereafter and on or about June 4, 1944 the said Martin Maury Horowitz was reinstated by his Local Board in IV-D classification.

11 15. That thereafter and upon instructions from New York City Selective Service Headquarters the Local Board reclassified the petitioner's son, Martin Maury Horowitz, in IA. Thereafter the Appeal Board sustained the classification in IA.

16. Thereafter petitioner's son made an application to City Selective Service Headquarters for a review and reopening of the case and was refused and denied by the City Selective Service Headquarters.

17. Thereafter petitioner's son, Martin Maury Horowitz, received notice of induction from his Local Board and in consequence thereof duly appeared at the induction center on February 15, 1944 and was inducted into the Army of the United States. He is now a member of the Armed Forces by reason of such induction.

18. Your petitioner respectfully alleges that upon the record in the case, upon the scholastic life history of the petitioner's said son, Martin Maury Horowitz, the registrant, to the present date, the said Martin Maury Horowitz has been an active and bona fide student of the divinity studying for the orthodox rabbinate in a recognized theological institution recognized as such by Selective Service authorities, and at no time abandoned or indicated any intention to abandon his studies for the rabbinate; that his case is such as was contemplated by Congress in the enactment of Section 5, subdivision (d) of the Selective Training and Service Act of 1940 with respect to exemption of students of the ministry in attendance at a recognized theological institution and therefore his classification in IA is an illegal, capricious and unwarranted act; that by virtue thereof his induction into the Armed Forces of the United States constitutes an unlawful detention and restraint of his liberty.

12 19. That your petitioner is making this petition at the request of and on behalf of petitioner's son Martin Maury Horowitz who may be removed from the jurisdiction of this Court before a petition can be signed by him personally.

20. Your petitioner respectfully prays that upon this application this Court require the production of the records, papers, affi-

davits and exhibits constituting the files and records of petitioner's son.

21. That no previous application has been made for the writ herein asked for.

Wherefore, your petitioner respectfully prays that a writ of Habeas Corpus issue herein directed to General M. Pierson, Post Commanding Officer, Fort Dix, New Jersey, for the purpose of inquiry into the case of the restraint and detention of Martin Maury Horowitz, petitioner's son, and delivering him therefrom forthwith pursuant to the statute in such case made and provided.

Dated: New York, February 19, 1945.

(S) HARRY HOROWITZ,
Petitioner.

13 [*Duly sworn to by Harry Horowitz; jurat omitted in printing.*]

14 In United States District Court

Writ of habeas corpus

Filed March 31, 1945

THE PRESIDENT OF THE UNITED STATES

To GENERAL M. PIERSON, *Post Commanding Officer at Fort Dix, New Jersey, greetings:*

You are hereby commanded, that the body of Martin Maury Horowitz by you restrained of his liberty, as it is said in the petition of Harry Horowitz dated the 16th day of February 1945, detained by whatsoever names the said Martin Maury Horowitz may be detained, together with the day and cause of being taken and detained, you have before the Honorable Thomas F. Meaney, Judge of the United States District Court in and for the District of New Jersey, at the Courthouse, Room #1 of said Court, in the City of Newark, New Jersey, at 10:00 o'clock A. M., on the 16th day of April 1945, then and there to do, submit to and receive whatsoever the said Judge shall then and there consider in that behalf; and have you then and there this writ.

Witness the Honorable Thomas F. Meaney, United States District Judge at Newark, N. J., this 26th day of March A. D. 1945.

WILLIAM H. TALLYN,
Clerk.

Per VERA ALEXANDER
Deputy.

Let the Writ of Habeas Corpus Issue.

THOMAS F. MEANEY,
Judge, U. S. Dist. Court.

Served the within Habeas Corpus, on General M. Pierson, Post Commanding officer, by delivering to and leaving with Lt. Col. John T. Daly, JAGD. the original and a copy thereof at Ft. Dix, in the District of New Jersey, on the 28th day of March 1945, at 3:30 P. M., the same time informing said person of its contents.

HUBERT J. HARRINGTON,
United States Marshal.
By ALLEN S. SMITH,
Deputy.

15 In United States District Court

[Title omitted.]

Return on writ of habeas corpus

Filed April 16, 1945

To the Honorable THOMAS F. MEANEY, *Judge of the United States District Court for the District of New Jersey:*

The respondent, Brigadier General Madison Pearson, Commanding General, Fort Dix, New Jersey, upon whom has been served a writ of habeas corpus for the production of Martin Maury Horowitz, respectfully makes return and states that he holds the said Martin Maury Horowitz by authority of the United States as a soldier in the Army of the United States, the said Martin Maury Horowitz having been duly and regularly inducted therein on or about February 15, 1945, under the provisions of the Selective Service Training Act of 1940 and amendments thereto.

Obedient, however, to the mandate of said writ, the respondent herewith produces before the Court the body of said Martin Maury Horowitz and prays this Honorable Court to dismiss said writ.

(S) Madison Pearson,
MADISON PEARSON,
Brigadier General, U. S. A.,
Commanding Fort Dix, N. J.

16 In the United States District Court

[Title omitted.]

Traverse

Filed April 16, 1945

To the Honorable District Court of the United States for the District of New Jersey.

Harry Horowitz, the relator herein, by this his traverse and

answer to the return of General M. Pierson, respondent to the Writ of Habeas Corpus herein, respectfully alleges and shows as follows, to wit:

First. Relator denies all allegations of fact and matters set forth in said return.

Second. And, further traversing and answering said return, the relator alleges that the facts set forth in said return do not legally warrant such restraint.

Third. And, further traversing and answering said return, the relator alleges that the facts set forth in said return do not legally warrant such restraint by reason of other facts not stated therein.

Fourth. And, further traversing and answering said return, the relator states that said return does not show legal warrant or authority for the detention of the relator.

Fifth. And, further traversing and answering said return, the relator reiterates all facts stated in the Petition filed herein in his behalf as reasons why such detention is without warrant of law.

17 Wherefore, the premises considered, Harry Horowitz, the relator herein, prays that the said Writ of Habeas Corpus be sustained and that he be delivered from the imprisonment and restraint of said respondent, as prayed for in the Petition for said Writ, and for his discharge from the custody, restraint, imprisonment and detention of his liberty, as hereinabove set forth, and for such other, further and different relief as to the Court may seem just and proper.

Dated: New York, April 16, 1945.

(S) HARRY HOROWITZ,
Relator.

18 [*Duly sworn to by Harry Horowitz; jurat omitted in printing.*]

19 In United States District Court District of New Jersey

Civil 5003

HARRY HOROWITZ, RELATOR

vs.

GENERAL M. PIERSON, POST COMMANDING OFFICER, FORT DIX, N. J., RESPONDENT

Appearances

For the Relator: Messrs. Willner & Willner, Meyer Kreeger, Esq. For the Respondent: Charles A. Stanziale, Esq. Assistant United States Attorney.

Hearing on return of Writ of Habeas Corpus.

Before Hon. THOMAS F. MEANEY, Judge, at the Federal Building, Newark, New Jersey, on Monday, April 16, 1945.

20 Mr. STANZIALE. Your Honor please, for the record I have filed with the Clerk the original to the return of the writ of habeas corpus and have given a copy to counsel for the defense.

Mr. WILLNER. If your Honor please, I would like to file with the Clerk at this time a traverse. I ask your Honor's permission to introduce Mr. Meyer Kreeger of the New York Bar and to ask permission for him to try the case.

The COURT. Very well. So ordered.

Mr. KREEGER. May it please your Honor, this is a writ of habeas corpus taken out under Section 5, Subdivision D of the Selective Service and Training Act of 1940 covering exemptions to ministers and students preparing for the ministry. The relator's case will consist of the testimony of two witnesses, and relator's son, on whose behalf this writ was obtained, and the testimony of Rabbi Henry A. Schorr, a leading rabbi of New York City, who was designated by the Local Board, I believe in May 1944, to pass upon the case and advise the Local Board accordingly.

Motion to sustain writ

At the outset I should like to make a motion for the record based on the fact that the return filed by the Government does not
21 in any way deny any of the allegations of fact set out in the petition, and since the return filed constitutes an answer to the Government, it is tantamount to an admission of the statements of fact, and under those circumstances there is no question of fact before the Court, and I therefore move that the return be ordered stricken and that the writ be sustained on the basis that there is no issue raised by the petition and the return.

The COURT. Mr. Stanziale, what have you to say to that? It seems to me there is a complete denial in the assertion that he was duly and regularly inducted under the provisions of the Selective Training and Service Act.

Mr. KREEGER. That is a denial of a conclusion of law as to whether or not he was regularly inducted.

The COURT. I shall take it as a complete denial of the facts alleged and deny your motion. You may have an exception.

(Which exception is hereby allowed and sealed accordingly.) (Sealed.)

Mr. KREEGER. I should briefly like to state some of the facts before I put the first witness on the stand. I think it may save time, with your Honor's permission. The relator's son
22 registered in the early part of 1941 under the Selective Service Law.

The COURT. Now, are you going to give me any information that is not contained in the petition, because I have the petition and I have read it and familiarized myself with the facts?

Mr. KREEGER. Yes; I think some of the facts that I am going to give to your Honor are not contained in the petition.

The COURT. All right.

Mr. KREEGER. And when returning the questionnaire to the Local Board, he took the matter up with the clerk of the Local Board, after stating the facts to him, and was advised by the clerk of the Local Board to fill in a request for a 4–D classification. At that time the registrant was preparing for admission to a seminary and was not yet accepted for admission.

As a result—and this does not appear in the petition—the question there which now contains the name of the seminary that he had been attending since later in 1941, did not have that name at that time. I am saying that now, your Honor, because otherwise when your Honor looks at the exhibit it might be confusing.

23 In January 1941, when the questionnaire was handed in, that allegation was not in there. As a matter of fact, that allegation in the questionnaire was never written in by the registrant himself, but was written in subsequently when a letter was filed by the registrant that he is now attending such and such a seminary. Somebody at the Local Board wrote in the name of the seminary in the appropriate place. Some time later when a question arose as to this man's proper classification, he appeared before the Local Board and upon their raising the point that he was not yet a student of the seminary, he called their attention to a case that had been disposed of in Connecticut of a divinity student, I believe in Yale—this does not appear in the petition and that is why I cannot call your Honor's attention to it—and the Local Board then told him, "If in that case, which you say is similar to yours, even though the man was not attending the seminary, if the Local Board classified him as 4–D, we will do the same in yours." He obtained the evidence in written form of the case in Connecticut, but the Local Board refused to follow that case and refused to classify him in 4–D.

24 The COURT. Well, I thought they did classify him in 4–D.

Mr. KREEGER. Yes; they did eventually, your Honor, and these are the facts. They do not appear in the petition, it will take but a few minutes, and I think it will really be confusing otherwise, to give you the background.

The COURT. All right.

Mr. KREEGER. Subsequently, shortly thereafter, when the Local Board said they didn't know whether they should classify him 4–D or not—because if I may remind your Honor, the entire question of admission to seminaries in the early part of 1941, was still

a question that was not yet finally determined—the registrant himself took his papers down to Washington and submitted them to National Headquarters to a Major Davidson, the same papers that had been submitted to the Local Board, and Major Davidson told him, "There is no question that you are entitled to a 4–D on these papers, on the basis of the facts. Go back home and I will advise City Headquarters." And City Headquarters evidently was advised by National Headquarters that the man belonged in 4–D, and I am referring to 1941; as a result of which the Chief of the Legal Division at the City Headquarters wrote a letter to this
25 Local Board stating, in effect, "We have been advised by National Headquarters that such and such is the case; we now advise you that this man belongs in 4–D on the basis of the fact that he is attending a recognized seminary and so forth." I may say there will be no question of the recognition of the school. That has never been raised in this case or any other case.

Immediately after the registrant received a 4–D from the Local Board and that 4–D was renewed in December 1943 on the Local Board's own motion——

The COURT. He got the first classification in October 1940; is that right?

Mr. KREEGER. Correct. In December 1943, that was renewed by the Local Board on its own examination according to the card that they sent the registrant. I will give you that date, Mr. Stanziale. Mr. Stanziale asked for the exact date. That was December 4, 1943, when it was continued.

The COURT. December 2nd it is set forth here.

Mr. KREEGER. Yes; that was 1941.

The COURT. No; December 2nd, 1943, defendant continued the same classification.

Mr. KREEGER. Yes; we received the card December 4, 1943. Thereafter, your Honor, and this next fact does not appear
26 in the petition, the Local Board did not ask for any review of this case by headquarters or by anybody; headquarters wrote a letter to the Local Board asking the Local Board to send this file for review, and thereafter the man appeared before a panel at the request of City Headquarters, a panel consisting of three laymen. There was not a single rabbi present; they voted against the registrant, and thereupon the headquarters wrote back to the Local Board stating the fact that the panel had voted against him and saying, "We are sending it back to you for reconsideration," or some such thing. In reliance upon that letter from headquarters, the Local Board wrote to headquarters saying, "In reliance upon your letter saying that we are to reconsider this case, we are forwarding or have forwarded this case to a local rabbi, Henry A. Schorr." The file and the man were sent to Rabbi Schorr. A

written report was brought in by Rabbi Schorr to the Local Board or sent in, I don't know which, and the rabbi stated that the registrant unquestionably was a bona fide rabbinical student preparing for the rabbinate, and thereupon the Local Board advised headquarters of this report and that they were accordingly sending the man a 4–D classification or restoring him to 4–D classification.

27 In that connection, your Honor, it appeared that this registrant had, as long ago as 1936, indicated in writing in numerous places, three years before the World War in Europe, five years before Selective Service and five or six years before Pearl Harbor, that his choice of profession was the rabbinate; and we will show your Honor—we have here even an album of public school, going back to 1932 or '33, in which the man put down as his choice of profession "rabbi," as long as 12 years ago. The evidence submitted, and this I believe does not appear in the petition but will be proved upon the hearing, showing his original intent to become a rabbi in written form, your Honor, was, first of all, the graduation book from the DeWitt Clinton High School in 1936, in which, as your Honor is undoubtedly aware, every graduate is asked, "What do you intend to make your profession?" and he puts in the answer and it is printed in a book, and he put down, "The rabbinate." In 1936 upon entering the College of the City of New York for secular education——

The Court. Well, you are arguing now, you are giving testimony. Let's get down to the facts, the factual situation.

28 Mr. Kreeger. Very well, your Honor. A number of these factual pieces of evidence were before the Local Board when Rabbi Schorr turned in his report. On the basis of this they gave him a 4–D. Within less than 60 days——

The Court. When was he first classed as 1–A?

Mr. Stanziale. First classed 1–D, your Honor.

The Court. No. When was he first classed as 1–A?

Mr. Kreeger. That was in May, your Honor. I haven't the Local Board file, it was in May of 1944, after receiving the report from headquarters.

The Court. May 1944?

Mr. Kreeger. May 1944.

The Court. On June 4, 1944, he was reinstated as 4–D?

Mr. Kreeger. 4–D and that continued for less than 60 days.

The Court. When was he reclassified as 1–A finally?

Mr. Kreeger. The end of August 1944. Again I must ask Mr. Stanziale if he has the record.

Mr. Stanziale. Yes; I have the whole file here, Judge Meaney.

The Court. Well, let me have the date.

29 Mr. Stanziale. Yes, your Honor; I am trying to get

the dates of these, Judge Meaney. Shall I give you all the classifications?

The COURT. Here is what I have so far; October 2, 1941, 4–D; December 2, 1943, renewed as 4–D; May 1944, classified as 1–A.

Mr. STANZIALE. That's right, sir.

The COURT. June 4, 1944, reinstated in 4–D.

Mr. STANZIALE. June 4, did you say? June 1st.

The COURT. June 1st?

Mr. STANZIALE. Yes.

The COURT. What date was it in May that he was classified as 1–A.

Mr. STANZIALE. May the 11th, 1–A.

The COURT. Now, then, in August 1944?

Mr. STANZIALE. August 10th.

The COURT. August 10th he was again classified?——

Mr. STANZIALE. 1–A.

The COURT. As 1–A?

Mr. STANZIALE. Yes.

The COURT. All right; and continued——

30 Mr. KREEGER. Thereafter an appeal was taken to the Board of Appeals and the classification was affirmed by the Board of Appeals and after that in Spite of application to the City Headquarters and to National Headquarters, the 1–A classification was continued, resulting in the man's induction.

Mr. STANZIALE. Have you anything further, Mr. Kreeger, to say?

Mr. KREEGER. No.

Mr. STANZIALE. Judge Meaney, so that we may proceed with the matter orderly, I think, for the purpose of the record and before the counsel for the applicant on the writ of habeas corpus proceeds with his case, I think he will want to refer to different parts of the record; I offer it as a Government exhibit at this particular time; the entire record.

The COURT. Available——

Mr. STANZIALE. Available to counsel for the defendant; the entire file of the defendant.

Mr. KREEGER. I have one objection to the file, your Honor, I object to the file so much of the file as has to do with the so-called panel and their report, as not being binding upon the registrant, since the panel is, first of all, not organized pursuant to any provision or enactment of law anywheres or regulation of Selective Service, as was admitted.

31 The COURT. Is there any regulation which authorizes a rabbi to give his opinion?

Mr. KREEGER. Yes; the Local Board may call upon anybody for advice under regulations.

The COURT. Then they may call upon a panel too.

Mr. KREEGER. The Local Board did not call in this case.

The COURT. It may accept the findings of panels if it desires.

Mr. STANZIALE. If it so desires, that is my understanding.

The COURT. I shall allow the whole record, and we will recess now until 2 o'clock.

(Received and marked "Exhibit G-1.")

AFTERNOON SESSION

Mr. KREEGER. With the Court's approval I should like to put on as the first witness Rabbi Schorr, in order to permit him to go back to his parochial business.

The COURT. Very well.

HENRY A. SCHORR, called and sworn on behalf of the relator, testified as follows:

Direct examination by Mr. KREEGER:

32 Mr. KREEGER. May I have the Local Board file?

Mr. STANZIALE. Surely. It is in evidence Mr. Kreeger.

Q. Rabbi Schorr, how long have you been ordained as a rabbi?—A. Since, June 1926.

Q. And are you a graduate of any theological school?—A. Yes.

Q. Which one?—A. Jewish Institute of Religion.

Q. And since 1926 have you been the rabbi in any Jewish communities?—A. Yes.

Q. Which ones?—A. Rabbi of Temple Teneal, better known as Unity Synagogue, from 1926 to 1930; since 1930, Rabbi for Temple Adath Israel, Grand Concourse and 169th Street, Bronx.

Q. Are you affiliated with any other institutions?—A. I have been Chaplain of Bellevue Hospital since 1926.

Q. Are you active in any other religious and secular movements in connection with the community?—A. Yes.

Q. And if so, which ones?—A. I served as President of the Bronx Council of Rabbis. I served as President of the Alumni Association of the Jewish Institute of Religion.

The COURT. I don't think there is any question about the rabbi's situation or the fact that he is a regularly ordained and accepted rabbi.

33 Mr. KREEGER. There is this much, Your Honor, if I may be permitted to say it, it will come out later in the course of the hearing that there is a letter here from headquarters giving the qualifications in full of three men who sat on the panel, and I think in all fairness to the registrant, since Rabbi Schorr recommended the 4-D, we should have Rabbi Schorr's qualifications, his position in the community as well, if it meets with your Honor's approval.

The COURT. Well, I am satisfied that the rabbi is possessed of all of the faculties pertaining to his rabbinate and that he is the product of a regularly accepted theological school and that he has been functioning since 1926.

The WITNESS. Yes.

The COURT. And you have been actively engaged only in the rabbinate?

The WITNESS. Right.

The COURT. I think insofar as we might speak of his qualification that they would be admitted.

Q. Now, Rabbi Schorr, in May 1944, did you receive any communication from Local Board No. 104?—A. Yes.

Q. And was that an oral or written communication?—A. To the best of my recollection, I think it was a telephone call.

34 Q. And who was the telephone call from?—A. From the chairman of the Local Board.

Q. And can you tell us what the substance of the conversation was?

Mr. STANZIALE. I object. I would like to have the name of the person who called him.

The COURT. Well, you were asked to go to the board, were you?

The WITNESS. No; I was asked for an appointment and the chairman said he would come to me.

The COURT. Then did you see the chairman?

The WITNESS. Yes, your Honor.

Q. Did the chairman ask you to do anything?—A. He brought with him a voluminous file with regard to a registrant by the name of Horowitz.

Q. And might I ask you incidentally, Rabbi Schorr, have you been connected in any capacity with Selective Service?—A. I had served as chairman of a Local Board in the Bronx.

Q. For how long a time about?—A. To the best of my recollection, about a year until I took ill.

Q. Did you undertake to review the file for the Local Board?—A. I did.

The COURT. Let me ask you. Did you appear before the board at any time in session?

35 The WITNESS. No, your honor.

The COURT. I am not going to hear anything that he may have told to any individual.

Mr. KREEGER. No; I am not going to ——

The COURT. Anything he did in his capacity of adviser to the chairman of the board sitting in session ——

Mr. KREEGER. I am not going to ask anything as to his conversation. I am aware of your Honor's objection to that.

Q. Was the file left with you by the chairman of the board?—A. It was.

Q. After the chairman's conversation with you di' Martin Horowitz appear before you?—A. He did.

Q. And di' you hold any conversation with him?—A. I did.

Q. And after the conversation and the examination of the file did you write a letter to the Local Board?—A. I did.

Q. And did you return the file to the Local Board?—A. I did.

Mr. KREEGER. Will it be conceded that this is a letter that was written?

MR. STANZIALE. It is a part of the file, Mr. Kreeger.

36 Q. And did you afterwards receive a letter from the Local Board?—A. I did.

Q. And did the letter thank you for your services?—A. It did.

Q. Did you recommend a 4-D classification of Martin Horowitz?—A. I did.

Q. Rabbi Schorr, I call your attention to a letter taken out of the Local Board file dated February 12, 1945, from New York City Headquarters to Local Board 104, which was the registrant's Local Board, and more particularly to the names of three gentlemen contained therein, Jonah J. Goldstein, William S. Evans, and E. Ivan Rubenstein, and ask you to look at the description of the three gentlemen in that letter. Now, Rabbi Schorr, have you any knowledge of Judge Jonah Goldstein?

Mr. STANZIALE. I object.

The COURT. What is the purpose of the question whether he has any knowledge of him or not?

MR. KREEGER. To prove that while he is a Judge of General Sessions, he is not a religious representative of the Jewish community New York City.

Mr. STANZIALE. I object, if your Honor please.

The COURT. You mean he is not a rabbi?

MR. KREEGER. No, no; he is not a religious representative.

37 I call your attention to the fact that Memorandum No. 94 from New York City Headquarters, the only one referring to the panel, specifically says an advisory panel of outstanding religious representatives.

The COURT. Well, what does that mean, what does "religious representative" mean? Am I to take his definition of that or yours, or am I to accept my own? Is there any further definition given in that memorandum?

Mr. KREEGER. That's all, your Honor. I am offering Rabbi Schorr as a qualified witness to testify as to whether these gentlemen in the community of which he has been a rabbi for 19 years are known as religious representative or layment.

The COURT. I don't think there is any such distinction; I don't think that is the question at all and I frankly don't care what the rabbi thinks about that. I don't think it is material—only for that reason.

The WITNESS. I understand, your Honor.

Mr. KREEGER. Of course, your Honor, what I am trying to prove is——

The COURT. Well, we will take judicial notice of the fact that neither Judge Goldstein nor Judge Evans nor Judge
38 Rubenstein is a rabbi or a member of any ordained portion of the religion.

Mr. KREEGER. Well, it goes further, your Honor. The words "religious representative" goes further than that in that it must be a man who has been active in a religious way.

The COURT. Well, don't you think that being president of the Federation of Jewish Charities and member of the Board of Directors of the Jewish Education Committee and a member of B'nai Brith; a member of the Federation for Support of Jewish Philanthropic Societies; member of the Jewish Education Committee; member of the United Synagogue of America; past president and member of the Board of Trustees of Temple Beth El and member of the Continuing Conference of the Jewish Theological Seminary of America might have a bearing on the fact of whether or not they are religious representatives within the purview of that memorandum which is not a binding direction?

Mr. KREEGER. It might, your Honor, it might not; depending upon each particular case.

The COURT. Not depending upon what the rabbi testifies; I shall accept the description given in this letter of February 12th of the Selective Service as descriptive of the religious affiliations
39 and activities of the three members. There is nothing in there that isn't so, is there?

The WITNESS. Not to my knowledge.

Mr. KREEGER. May I have an exception to that ruling, your Honor?

The COURT. To what ruling? That I didn't care what he thought about it?

Mr. KREEGER. No; that you denied my right to ask him that line of questions.

The COURT. You may have an exception, I don't think it is material.

(Which exception is hereby allowed and sealed accordingly.) (Sealed.)

Q. Rabbi Schorr, what was your basis for recommending a 4-D classification in the case of Martin Horowitz?—A. My sincere belief that he had prepared himself for the profession of the rabbinate for many years.

Q. Would you like to see your letter of May 31, 1944?—A. If there is no objection I would.

The COURT. Give us your own recollection; tell us what you did.

The WITNESS. After the examination of the file and an interview with the registrant, it seemed to me quite clear that this
40 man was a bona fide divinity student and was thinking of the rabbinate as a life calling and not in order to evade any service in the Government.

The COURT. How far had he gone, at the time you conferred with him, in the course which led exclusively to the rabbinate?

The WITNESS. To my best recollection, several years; I don't recall.

The COURT. Where had he gone?

The WITNESS. To the American Rabbinical Seminary of America, better known as the Chafetz Chayim.

Q. I show you letter, May 31, 1944, and ask you if that will refresh your recollection as to any further grounds you had at that time for recommending a 4-D?

The COURT. Is that the letter you sent to the board?

The WITNESS. Yes.

The COURT. Did you have any other communication to the board with reference to this young man?

The WITNESS. None written.

The COURT. Any formal appearance before the board?

The WITNESS. No, your Honor.

Q. Now, Rabbi Schorr, are you connected with the Jewish Education Committee?—A. I am.

Q. Is that a Jewish religious body?

41 Mr. STANZIALE. I object, if your Honor please; it is immaterial whether he is acquainted with it or whether the Jewish Education Committee is a religious body; it has nothing to do with the gravamen of this case. I think what we should restrict ourselves to is the basis upon which the rabbi entered his opinion.

The COURT. That is set forth in his letter.

Mr. STANZIALE. That is set forth in his letter. I think this is all collateral.

Mr. KREEGER. The rabbi is also here as a witness, your Honor. As long as he is here I am using him as an expert in connection with some of the things that appear in the file as having come from headquarters under a guise of Jewish authority. I intend to show by him——

The COURT. You are starting out with the implied premise that unless there is a rabbi on this panel that the panel is not qualified to pass upon the status of the registrant. I don't think I accept that as a premise.

Mr. KREEGER. I know your Honor doesn't accept it, because your Honor has so indicated before. I am trying to proceed to show that these so-called qualifications which Selective Service
42 Headquarters deemed itself bound to show in order to give

some color of authority for these people who are on the panel, are not as a matter of fact in most instances religious organizations at all, having nothing to do with religion.

The COURT. Suppose they are not?

Mr. KREEGER. Well, these men, your Honor, under the only memo that created the panel, are not the religious representatives—at least not a religious body, and the language of the memorandum is very specific in that.

The COURT. I don't know that the fact that they are not rabbis prevents them from having a faculty of religious representative. For instance, I think I may pretty well announce myself as a representative of the Catholic religion; the mere fact that I am not a deacon or subdeacon or priest or any of the hierarchy would not prevent me from being a religious representative of my faith; I mean, I am si'ply arguing analogically.

Mr. KREEGER. The analogy stops at a certain point, because there is a difference in the organization of the two faiths. Whereas one who is a member of your faith, your Honor, is affiliated with the Church, and there is only one organization
43 for the Church, we have separate communities in our faith, and if a man is not affiliated with some community or other, he is just not affiliated in a religious way.

The COURT. Well, he is a religious representative of the Jewish faith, isn't he?

Mr. KREEGER. Well, the Selective Service Headquarters cannot say that merely because a man is a Judge of the Court of General Sessions and happens to have been born a Jew he is a religious representative of the Jewish faith.

The COURT. No; but the board may call in those people who they think are representative Jews and ask them their opinion in an advisory capacity and use that in arriving at a determination.

Mr. KREEGER. Is your Honor referring to the Local Board?

The COURT. Yes.

Mr. KREEGER. The Local Board didn't even have——

The COURT. Well, get to that then. I am her' to hear evidence, I am not here to have you make speeches or give testimony.

Mr. KREEGER. No; I don't want to give testimony.

The COURT. Then let's get down to the meat of it and find
44 out what did happen. Now, do you want anything further from the rabbi?

Mr. KREEGER. Yes; I should like to ask questions about these organizations.

The COURT. I don't care to hear it.

Mr. KREEGER. Exception.

The COURT. You may have an exception.

(Which exception is hereby allowed and sealed accordingly.)
(Sealed.)

The Court. Do you know whether or not these men are representative Jews, speaking from a religious standpoint, nor from a folk standpoint? Do you know that they are not professing religious Jews, Jonah Goldstein or Judge Evans or Judge Rubenstein? Would you say that it is your mature and considered opinion that they are not practicing members of the Jewish religion?

The Witness. I couldn't possibly say that.

Mr. Kreeger. Your witness.

Mr. Stanziale. No questions.

Martin M. Horowitz, called and sworn on behalf of the relator, testified as follows:

Direct examination by Mr. Kreeger:

Q. What is your father's name?—A. My father's name
45 is Harry Horowitz.

Q. And is he the relator who signed the petition in this case?—A. Yes, he is.

Q. Where were you born?—A. I was born in New York City.

Q. Did you attend public school?—A. Yes, I did.

Q. What public school?—A. I attended Public Schools 41, 56, and 83.

Q. From which one were you graduated?—A. 83.

Q. I show you this little album and ask you whether it is your public school graduation album?—A. It is.

Q. And is the page at which I have it open in your handwriting?—A. It is, sir.

Q. When did you graduate from Public School 83?—A. In June 1932.

Q. And when was this page written that I am showing to you?—A. About the same time.

Q. And I call your attention more particularly to the word "Rabbi" next to the printed word "Profession." Will you tell me who wrote that word?—A. I did, sir.

Q. When did you write it?—A. I wrote it some time in June 1932.

Mr. Kreeger. I offer this page in evidence, Mr. Stanziale.

Mr. Stanziale. I have no objection, Judge Meaney.

46 (Received and marked "Relator's Exhibit 1.")

Q. Did you go to high school, Mr. Horowitz?—A. Yes, sir.

Q. What high school?—A. De Witt Clinton.

Q. Did you graduate?—A. I was graduated from De Witt Clinton High School in June 1936.

Q. And is this "The Clintonian" your graduation book for June 1936?—A. It is.

Q. Is this your book and your name appearing on the lower column, left column of the right page [indicating]?—A. Yes, it is.

Q. And how long have you had this book?—A. Since I was graduated, in June 1936.

Mr. KREEGER. May I offer it in evidence?

The COURT. Any objection? Offer it in evidence.

(Received and marked "Relator's Exhibit 2.")

Mr. KREEGER. May the record indicate that exhibit marked "Relator's 2" contains the following memorandum, referring to Martin Horowitz: "Horowitz, Martin M." "Martin" C. C. N. Y. Beneath that in light type, "Chorus, Hebrew Society Mathematics Club." Beneath that in heavier type, "The Rabinate" and the legend, "Still waters run deep."

47 Q. Do the letters "C. C. N. Y." represent the fact that you were applying for admission to the College of the City of New York?—A. Yes, sir.

Q. And what does the word chorus mean?—A. It means that I sang in the school chorus.

Q. What does the word Hebrew Society mean?

The COURT. Those were societies in the school, weren't they?

The WITNESS. Yes, sir.

The COURT. Hebrew Society?

The WITNESS. Yes, sir.

Q. When the book was being made up did you notify the editor that your choice of profession was the rabbinate?—A. I did, sir.

The COURT. Did you go to C. C. N. Y.?

The WITNESS. I did, sir.

Q. I show you a general organization certificate of De Witt Clinton High School and ask you what that represents?—A. It means that I had given service to the Hebrew Club at the High School.

The COURT. For what year?

The WITNESS. That was January 1936.

Mr. KREEGER. I offer that in evidence.

Mr. STANZIALE. I object to that.

The COURT. Hebrew Club?

The WITNESS. Yes.

48 Mr. STANIZALE. I object to that. They have in the High School the French Club, the German Club—it doesn't mean anything.

The COURT. I will allow it.

Q. And similarly for the year 1935?—A. Same thing.

The COURT. Did you study Hebrew there?

The WITNESS. No; we have what is called Jewish Culture Society.

Mr. KREEGER. We offer it in evidence.

(Received and marked "Relator's Exhibit 3.")

Q. Did you enter City College in September 1936?—A. I did, sir.

Q. And did you answer a questionnaire concerning your interest in the various professions possible?—A. I did; I answered the questionnaire that my first choice of profession was the rabbinate.

Q. And your second?—A. The second was teaching.

Q. And your third?—A. I believe was lawyer or C. P. A.

Q. Did you make out a similar or answer a similar questionnaire in 1937, when you continued at City College?—A. I did.

Q. And how did your questionnaire run then?—A. I had number 1, teacher; number 2, rabbi and 3, I believe, was lawyer.

Q. Now, going back for a moment to your years at
49 high school——

The COURT. Well, let's go ahead instead of going back. Let's get down to the examination before the board. I am satisfied that you have indicated a course on his part which tended towards studying for the rabbinate. Now, let's come down to the question of what happened before the board, which after all is the thing we are concerned with, whether the board acted without proper basis in taking the action which it took, whether it acted arbitrarily and capriciously.

Mr. KREEGER. I merely want to show the other activities in the religious field.

The COURT. But you see, what we are concerned with is what happened before the board. I wanted to be a priest until I was seven, I had a violent desire to be a cardinal, but I changed my mind. What we want is the situation before the board; what they had before them on which they acted which constituted arbitrary and capricious action.

Mr. KREEGER. These are the very things, your Honor.

The COURT. I am not concerned with these. I want to find out what the board had before them. Let's take the record.

50 Mr. STANZIALE. May I suggest that we look at the questionnaire first?

The COURT. Let's take the record and the actions that the board took, which you say were capricious and arbitrary.

Mr. KREEGER. May I lead him up to that point quickly, your Honor, just to cover the intervening years?

The COURT. Well, did you graduate from C. C. N. Y.?

The WITNESS. No.

The COURT. How far did you go?

The WITNESS. I have about 100 credits.

The COURT. How far did you go?

The WITNESS. Up to the senior year.

The COURT. Up to what year?
The WITNESS. I completed three years.
The COURT. Nineteen what?
The WITNESS. I stopped attending there; I stopped in 1943.
The COURT. 1943?
The WITNESS. Yes, sir.
The COURT. When did you go there?
The WITNESS. In the beginning I went in the daytime.
51 The COURT. When did you first start there?
The WITNESS. 1936.
The COURT. And how long did you go regularly?
The WITNESS. Oh, I went until 1941.
The COURT. Five years?
The WITNESS. Yes, sir.
The COURT. What part of 1941?
The WITNESS. Until July of 1941.
The COURT. July 1941. Were you a full-time student in all that time?
The WITNESS. No; I never was a full-time student in the sense that I carried a full program.
The COURT. Did you do anything else while you were going to C. C. N. Y.?
The WITNESS. Well, I attended courses at Jewish Theological Seminary.
The COURT. Did you do anything else—did you work?
The WITNESS. I never worked.
The COURT. Did you take your course at C. C. N. Y.
The WITNESS. Yes, sir.
The COURT. And at the same time——
The WITNESS. At the same time I was taking preparatory for entrance into a rabbinical seminary.
52 The COURT. Until when?
The WITNESS. Until 1941, that is, well, until I was actually in the seminary itself.
The COURT. When did you go into the seminary?
The WITNESS. September 1941.
MR. KREEGER. May I proceed?
The COURT. Yes.

By Mr. KREEGER:

Q. After you entered the seminary in September 1941, did you continue there in regular attendance?—A. I did, sir.

Q. And you were still enrolled as a student there down to the date of your induction?—A. Yes, sir.

Q. Between 1939 and 1941 did you take any special preparatory courses for this particular seminary?—A. Yes, sir; I was studying

privately with a certain Rabbi Levine in preparation for entrance into the Rabbinical Seminary of America.

Q. And that is the seminary which you eventually entered?—A. Yes, sir.

Q. Was Rabbi Levine in any way affiliated with the seminary?—A. He was one of the founders of this seminary.

Q. Coming down to the date when you registered for Selective Service, do you recall when that was?—A. That was some time in January 1941.

53 Q. And did you get a questionnaire to fill out?

The COURT. January 1941?

The WITNESS. Yes, sir.

The COURT. Was that before you went into the seminary?

The WITNESS. Yes, sir.

Q. And did you get a questionnaire to fill out?—A. Yes, sir.

Q. Did you fill out the questionnaire?—A. I did.

Q. Did you return with it to the clerk of the Local Board?—A. Yes, sir.

Q. Did you there have a conversation with him?—A. I did.

Q. Don't tell us what you said to him. As a result of this conversation with him did you do anything in connection with that questionnaire?—A. He advised me to—there was a special paragraph at the end of the questionnaire asking registrant which classification he thought he merited, and he advised me to put down classification of 4-D.

The COURT. Did you?

The WITNESS. I did, sir.

Q. But you were not at that time a student of the seminary yet?—A. I was not.

54 Q. When did you make formal application for admission to the Rabbinical Seminary of America?—A. In April 1941.

Q. Why did you wait until April 1941?—A. Because I didn't feel I was prepared sooner than that.

Q. When were you accepted?—A. I was accepted in May 1941.

Q. Whom did you see when making application?—A. I saw the head of the school, Rabbi David Leibowitz of blessed memory.

Q. For what term of the school were you accepted?—A. I was accepted for September 1941.

Q. Was that the following term after your application?—A. That's right.

Q. Did you advise the Local Board of your acceptance by the seminary?—A. I did, sir.

Q. Was that in writing?—A. Yes, sir.

Q. And did you receive a 4-D classification from the Local Board immediately?—A. I did not.

Q. What happened?—A. I presented the Local Board with my evidence.

The COURT. When?

The WITNESS. I imagine it was some time in May; I presented the letter from the seminary and also statement from the Jewish Theological Seminary that I had attended courses there
55 from 1935 until 1939, and an affidavit from Rabbi Levine stating that I had been studying with him in preparation for entering the Seminary from 1939 until 1941.

Q. What did the Local Board do about that?—A. I received a 1-A from the Local Board.

The COURT. When were you classed as 1-A?

The WITNESS. That was I believe July 1, 1941.

Q. And did you take an appeal?—A. I did, sir.

Q. And what happened on the appeal?—A. On the appeal I received number 1-A.

Q. And did you take the matter up with any higher Selective Service authority?—A. I did, sir.

Q. What did you do?—A. I went to Washington to discuss my case with Selective Service Headquarters.

The COURT. All right. Did you get a reversal of your classication?

The WITNESS. Yes, sir; I talked to Mr. Davidson and he said——

The COURT. Never mind what he said. Did your Local Board reverse the classification?

The WITNESS. In October of 1941 I received a 4-D.

Mr. KREEGER. Have you seen a letter here from Major Durham?

56 Mr. STANZIALE. I don't know. There are a lot of letters in there, I don't know which is which.

Mr. KREEGER. It was in here this morning.

Mr. STANZIALE. If it was there this morning it should be there now.

Mr. KREEGER. Will your Honor bear with me? This is arranged not in chronological order. I should like to read to your Honor a short letter.

The COURT. Let me have it.

Mr. KREEGER. Yes, surely.

The COURT. All right, carry on. Now you have him down to October 2nd, when he was placed in 4-D.

Q. And did you subsequently receive a card from the Local Board continuing you in 4-D?—A. I did, sir.

Q. And is this the card you received?—A. Yes, sir.

Mr. KREEGER. Offered in evidence.

The COURT. The whole file is in evidence. What is the card?

Mr. KREEGER. This is a card that is not in the file that is dated

December 4, 1943 to the registrant that he is retained in Class 4-D until further notice.

Mr. STANZIALE. There is no dispute about that.

Mr. KREEGER. In your file you have a different date, December 2nd; we have it December 4th. We want no differences as to dates.

57 The COURT. December 4th.

Mr. KREEGER. That is the card we got; we don't know what the Local Board did.

The COURT. December 4th was the notice mailed that you received?

The WITNESS. Yes, sir.

The COURT. Informing you that you were retained in Class 4-D until further notice?

The WITNESS. Yes, sir.

The COURT. All right.

Q. When did you next hear from the Local Board?—A. I received a communication from them I believe some time in April 1944, directing me to appear for a preinduction physical examination.

Q. And did you so appear?—A. I did, sir.

Q. And when did you next hear from Selective Service?—A. It must have been some time toward the end of April.

Q. Nineteen——A. 1944.

Q. And what was that message?—A. It was a letter from City Selective Service Headquarters requesting me to appear before—I don't know what was the language of it, but I was supposed to appear at City Selective Service Headquarters.

Q. And did you appear?—A. I did, sir.

Q. And before how many gentlemen did you appear?—

58 A. I appeared before three gentlemen.

Q. And were you asked the questions?—A. I was, sir.

Q. And did you make answers—A. I did, sir.

Q. And after that did you hear further from the Local Board?—A. I did; I received a 1-A from the Local Board.

Q. When?—A. In May 1944.

Q. Was it May 11?—A. Yes, sir.

Q. And did you ask for a hearing by the Local Board?—A. I did.

Q. And did you have the hearing before the Local Board?—A. I was told that I would be sent to Rabbi Schorr and that my file would be sent down to him and he would determine whether or not I was a bona fide divinity student, and I was told that upon his decision——

The COURT. All right. On June 1, 1944, you were reinstated as 4-D?

The WITNESS. I was.

Q. After June 1, 1944, when you received your 4-D classification, did you hear anything further from the Local Board?—A. I received a notice to come down to the board and when I came—I don't remember the time—I think it was——

Q. In August?—A. I think it was in August—I was told I would be put into 1-A.

59 Q. And did you have any conversation with the members of the Local Board at that time?—A. Yes, I did. And if I may go back——

Q. Just at that time I am asking about. August '44—A. I was told that while these people would have been satisfied to keep me in 4-D classification, they had had continual notices from headquarters concerning me and they didn't want to have any more discussions about it, and they decided to put me in 1-A.

Q. And did you file any further papers with the Local Board?—A. I did, sir.

Q. And did you ultimately have an appeal to the Appeal Board on that classification?—A. I did.

Q. And what did the Appeal Board do? A. I was given again a 1-A.

Q. And eventually did you receive an induction notice?—A I did.

Q. And as a result of that you were inducted into the Army service?—A. I was.

Q. Now, Mr. Horowitz, throughout the years 1935 to 1940—the end of 1944, and down to the present day, what has been your intention as to your professional life?—A. I wanted to become a rabbi.

Q. Have you at any time during those years wavered in your intention?—A. No, sir.

Q. Have you been engaged in any religious activities
60 since 1939 for which you received compensation?—A. Yes, sir.

Q. What were those activities?—A. I taught in a religious school. I always served as a cantor and recently was serving as assistant to the rabbi in my congregation.

Q. Where was that congregation?—A. Mount Vernon.

Q. How long have you been affiliated with that congregation?—A. I have been affiliated with that congregation, oh, it is about a year now; since April 1944.

Q. Were you the instructor of the religious school there before you became the assistant to the rabbi?—A. Yes, sir.

Q. For how long?—A. That was from April until September of 1944.

Mr. KREEGER. Your witness.

Cross-examination by Mr. STANZIALE:

Q. Mr. Horowitz, in February of 1941 you had applied for readmission to enter the City College of New York, did you not?

The COURT. February when?

Mr. STANZIALE. 1941.

A. I had applied previously but I hadn't been accepted before that time.

61 Q. When was the last time prior to February 1941 that you attended City College?—A. It was the term of February 1940. There was a gap of the term.

Q. Now, you received a questionnaire in the early part of January, did you not?—A. I did.

Q. And you sent your answers on the questionnaire in January, the 24th, 1941, did you not?—A. I don't remember the exact date, but it was in January.

Q. And attached to the questionnaire there was a supplemental statement, was there not?—A. Yes, sir.

Q. Now, I show you the questionnaire with the supplemental statement attached and I ask you if the supplemental statement attached is a supplemental statement that you sent with your questionnaire?—A. It is.

Q. Now, is it not a fact that in the questionnaire—in the supplemental statement with the questionnaire, you stated that your vocation or your work for which you had prepared yourself or intended to prepare yourself was as a psychiatric social worker?—A. I did, sir.

Q. And is it also not a fact in your supplemental statement that you desired the board to have you continue your studies at the college until February of 1943, so that you could prepare yourself for this social work?—Yes, sir.

62 Q. And is it also not a fact that at no time in your supplemental statement did you state to the board that you were preparing yourself for the rabbinate; is that correct?—A. That is right.

Q. Now, is it also not a fact that after the filing of your questionnaire and not until September semester of 1941, did you actually begin or continue your studies for the rabbinate?—A. I don't understand that question.

Q. Well, did you not in the September semester take up your studies for the rabbinate?—A. I had been preparing straight along; I was not a member of the seminary until September, but I had been in preparation up until that date.

Q. But you started attending the seminary in October 1941, and after you had filed your questionnaire with the Draft Board?—A. Yes, sir.

Q. Now, is it also not a fact that on January the 1st—I withdraw that.

What was your first classification that you received from your board after the receipt of your questionnaire with the supplemental statement attached?—A. 1-A.

Q. Very well. Can you tell us when that was?—A. Well, it was the early part of 1941, but I don't remember exactly.

Q. Was it in the month of February or March?—A. It might have been; I don't remember.

63 Q. And then you later received a 1-A classification on July 1, 1941; isn't that so?—A. Yes, sir.

Q. And it was only after you had sent a statement to the effect that you were beginning your studies in a seminary in September of 1941, that that classification was changed; isn't that so?—A. Yes.

Q. Did the fact that you had received a 1-A classification—Did you take it upon yourself to go to a seminary in order to obtain a 4-D classification?—A. Most assuredly not.

The COURT. Well, why did you say in your application there in 1943, you "would be a happy, joyous, glad person to volunteer for service"?

The WITNESS. If I may explain, the entire——

The COURT. No; just answer that question. At that time when you filed your questionnaire, the only thing you were concerned with was finishing so that you could become a social worker.

The WITNESS. Well, at that time I was a predivinity student—I was not aware——

The COURT. No; at that time were you going into the rabbinate or not?

The WITNESS. I was, sir.

The COURT. Because in 1943 you said you would gladly go into the Army.

64 The WITNESS. I was at that time going into the rabbinate.

The COURT. Well, were you going into the rabbinate or were you going into the Army in 1943; which?

The WITNESS. I was going into the rabbinate, sir, but I filed that paper at that time and I did not know that there was such a thing as predivinity classification and I asked——

The COURT. Yes; but you didn't say you were studying for the divinity; you said you were studying for a psychiatric worker.

The WITNESS. That's true; I was studying that course because that is what I considered——

The COURT. A position you thought you liked.

The WITNESS. That is what I considered a very important complement to the rabbinate.

The COURT. Why didn't you use the word "rabbinate" in this whole application?

The WITNESS. Because, sir, I was not at that time a member of a rabbinical school.

The COURT. Why didn't you say you were going to be a rabbi instead of a psychiatric worker?

The WITNESS. Because at that time the only thing offi-
65 cially recognized by the Local Board was my college studies; I was not a predivinity student and I didn't know of any——

The COURT. Well, why didn't you say you were going to be a rabbi instead of saying you were going to be a psychiatric social worker? They are not identical. The only religious thing you indicated or you did speak about was being a cantor, and then you say, "As a dejected person I could be of little value to an army, but as a grateful person two years later I would come willingly with blessings on my lips and in my heart for the justice which had been meted out to me."

Q. Now, in 1936, when you were going to school——

The COURT. Let's come down to a later time.

Mr. STANZIALE. Very well, sir.

The COURT. Let's come down to the date of the first application when the Board classified him in 1-A; then it was appealed and the classification 4-D was given.

Mr. STANZIALE. Yes, your Honor; yes, sir.

The COURT. Now, was that on a rehearing or what?

Mr. STANZIALE. Yes, your Honor; I will bring it right out.
66 The COURT. Let's get right down to it.

Q. Now, you appeared before a theological panel, did you not?—A. I did.

Q. And you were asked questions by the members composing the theological panel?—A. I was.

Q. You later were called before the board, were you not, after your appearance before Rabbi Schorr?—A. After my appearance before Rabbi Schorr.

Q. Yes; and after your appearance before the theological panel at the both hearings?—A. At the both hearings, after the Rabbi Schorr, I received 4-D.

Q. Then you were called before the board?—A. That's right.

Q. And before the board you were questioned by the board, weren't you, in the early part of August?—A. Yes.

Q. As a result of the hearing that you had before the board, you then received the 1-A classification, isn't that so?—A. The fact is that it wasn't a hearing as far as I remember and understand; they had told me that I was getting a 1-A and they did not ask me——

Q. They asked you questions?—A. They asked me just one question and told me I was getting a 1-A.

The COURT. What did they ask you about?

The WITNESS. They asked me about the change from 1936
67 to 1937 of the order of the rabbinate from number 1 to number 2 in my choice.

Q. You then got a 1-A classification, didn't you?—A. I did.

Q. And then you appealed this 1-A classification?—A. I did.

Q. And you stated the grounds for your appeal?—A. Yes.

Q. And all your files together with the grounds for your appeal were submitted to the Appeal Board?—A. Yes.

Q. And the Appeal Board sustained the finding of the Local Board?—A. Yes.

Q. And then you were inducted in the Army?—A. No; I asked for a hearing before my Local Board.

Q. And you were turned down again, weren't you? Answer the question so that the stenographer can hear you.—A. Yes.

Q. And then wrote a letter, did you not, bearing the date of December the 15th, 1944—this is in your handwriting, sir?—A. Yes.

Mr. STANZIALE. May I have it, please?—A. [handed to Mr. Stanziale]

Q. And in your letter you asked for a determent of your induction until after your wife gave birth to a child?—A. That's right.

68 Q. And in order to meet your medical expenses?—A. Yes.

Q. And in order for some one to replace you in the congregation; is that correct?—A. Yes; that was after I had been established, that I had been turned down by the Appeal Board.

Q. All the facts that you have testified to today were taken up before the Appeal Board—were taken up before the Local Board and the Appeal Board and they were passed on?

Mr. KREEGER. I object to that. He has no knowledge of what was taken up.

Q. Well, you submitted documents, did you not?

The COURT. Well, the documents are in the record.

A. I did.

Q. And the documents contain substantially the same testimony you are giving today?—A. Yes.

Mr. STANZIALE. I have no further questions, Judge Meaney.

Redirect examination by Mr. KREEGER:

Q. Now, when this statement in yellow paper was handed in by you, was your questionnaire on file at the Local Board?—A. I handed it in together with my questionnaire.

69 Q. And was it at the same time that at the suggestion of the clerk, you filled in "4-D" in your questionnaire?—A. Yes.

Q. So that when this yellow statement went in, yellow page statement went in, the questionnaire was on file with your 4–D application?—A. Yes, sir.

Q. In referring to the letter of December 15, 1944, in which you ask that your induction be deferred for 90 days, was that for the purpose of enabling you to make certain family adjustments?—A. Yes, sir.

Q. And take care of certain obligations?—A. Yes, sir.

Q. Did you mean thereby to waive your position as a rabbinical student?—A. Most certainly not.

Q. When you appeared before the Local Board in August 1944, were you shown by the Local Board the communication from headquarters concerning your 1937 City College questionnaire?—A. Yes, sir.

Q. And did the Local Board members say anything to you about it at that time?

Mr. STANZIALE. I object, sir.

The COURT. I will allow it.

Q. Did they?—A. They gave me the impression, sir——

The COURT. No; did they say anything to you about it.

Q. What did they say to you in giving the impression,
70 the substance of what they said that you don't remember exactly?—A. Well, substantially, I would think it was that they would have been satisfied to accept their opinion which they gave as a result of Rabbi Schorr's letter, but that they had received a communication from headquarters which was forcing them to do otherwise.

Q. Now, this communication from headquarters——

The COURT. Is it in the file?

Mr. KREEGER. It is in the file, your Honor.

Mr. STANZIALE. I don't remember seeing a letter to that effect, sir, in the file.

Mr. KREEGER. There was a communication from, I believe——

Mr. STANZIALE. Headquarters, requesting the reopening of the 4–D classification, but there was nothing in the file, Mr. Kreeger, indicating that the City Selective Service imposed its will upon this board to change its classification.

Mr. KREEGER. That is a question——Can I have that letter, please?

Mr. STANZIALE. You look there and I will see if it is here.

Mr. KREEGER. May I have it?

Mr. STANZIALE. Yes, surely; it is part of the record; suppose we show it to Judge Meaney.

71 Mr. KREEGER. No; I want the letter which came after he had received the 4–D.

The COURT. Look it over. I will take a three-minute recess. See if you can find it.

(A short recess was taken.)

Mr. KREEGER. Evidently, your Honor, the local file submitted here is not complete, because we have copy of letter that was taken from the Local Board file by the registrant in August, but the original is not in the file.

The COURT. That is the file as presented, sir.

Mr. KREEGER. Well, of course, we don't know whether everything is in it until we come across the item, but I can state to your Honor now definitely that this is not the complete file of the Local Board record.

The COURT. Well, what is the letter that you say isn't there?

Mr. KREEGER. Letter from Captain Richter, Chief of the Legal Division of the Selective Service in New York. I have a copy here I can read it to your Honor, it will show that it is important: "We return herewith the cover sheet and file of the above registrant forwarded to this Headquarters"——

72 Mr. STANIZALE. Just a minute, we may save some time. If there is such a letter I want it to be produced; if it should be in here I want it.

Mr. KREEGER. There is also a Communication from the Director of Student Personnel Bureau of the College of the City of New York relative to the registrant, and an official transcript of the latter's record certified by an assistant registrar of the College: "It will be noted that while in September 1936, registrant indicated his vocational preference in the following order: (1) rabbinate; (2) teaching mathematics, and (3) lawyer and C. P. A., his first choice one year later, September 1937, was teacher, with rabbi and lawyer in second and third place respectively"—and this is the important part of the letter to me: "In view of the importance of the question of intention in the present case (see our letter of June 5) it is requested that the Local Board reopen and reconsider the registrant's classification of June 1st in the light of the additional information presented and advise this Headquarters of the action taken in the matter." In other words, Selective Service Headquarters said that since rabbinate appeared first in 1936 on his list of choices, and second in 1937 on his list of choices, that showed a question of intention in the

73 present case in 1944, under which the case should be reopened.

The COURT. Well, reopening it doesn't necessarily mean they have to follow directions.

Mr. STANZIALE. Or imposing its will. May I show the Court a copy of the letter, so that there may be no misunderstanding?

The COURT. The Local Board could have refused to reopen, could have reconsidered and passed on it. There is nothing in that that directed them.

Q. Is that the letter that the Local Board showed you when you went there in August?

The COURT. Suppose it was, what about it?

Mr. KREEGER. I want to ask him is that the letter in connection with which they had the conversation with him as to which he testified.—A. I believe it is.

Q. And was that the time they had the conversation with you in connection with which you made testimony before the recess?—A. Yes, sir.

Mr. KREEGER. Mr. Stanziale, is this from the Local Board file?

Mr. STANZIALE. No; you referred to such a letter and Mr. Agress had it when I asked if there was such a letter.

74 Mr. KREEGER. May I have the record indicate that the Local Board file did not contain the letter?

Mr. STANZIALE. Well, I don't know, I haven't searched this yet; it may.

Mr. KREEGER. Well, we have searched it, your Honor, both Mr. Willner and myself and we couldn't find any such letter in the file.

The COURT. Well, I don't know if it is in there or not. Was there a letter sent to the Local Board from the City Headquarters?

Mr. STANZIALE. Yes; evidently there was a letter sent. I may state for the record, sir, that the file has been in the hands of Mr. Kreeger; has been all over; not that I am casting any implications, but I don't like that there should be any implication——

The COURT. It was not in the file.

Mr. STANZIALE. But I have asked to produce a copy.

Mr. KREEGER. May I have the record show that the record was only in my possession under the supervision of Lieutenant Lathrop, who did not move from my side. Is that correct, Lieutenant Lathrop?

Mr. STANZIALE. I am not casting any reflections on you.

75 Mr. KREEGER. I just want the record to indicate it, sir.

The COURT. Is that the relator's case?

Mr. KREEGER. That is the relator's case.

Mr. STANZIALE. The Government rests on the exhibit offered in evidence which is the file of the registrant. If there is any preliminary argument your Honor would care to hear——

The COURT. Do you wish to be heard?

Mr. KREEGER. Yes.

The COURT. I don't want to be abrupt, but the only situation I am concerned with is this, whether there is justification for the writ of habeas corpus to pass on the question of whether or not this man was the object of such ill-considered action on the part of the board as would justify my having him discharged. Now, the only thing that I am concerned with is whether the board acted capriciously and arbitrarily. I don't care about his actual inten-

tion, because I am not going into that; I am going into whether the record shows that the board had any credible evidence upon which to act in its classification. I am willing to admit that by the fact that the board shifted, that it did show indecision, but its final determination was to classify this applicant as 1–A.

76 Now, what about the record indicates that their action was arbitrary or capricious?

(Argument by counsel for the relator, Mr. Kreeger.)

The COURT. The only thing that I can pass upon is whether the final determination arrived at by this board was based upon credible evidence. Suppose the board arbitrarily put a man in 4–D when he wasn't even a student of any religion, just did it arbitrarily; and then reconsidered it and placed him in 1–A, then reconsidered it again and placed him in 4–D, then reconsidered it again and placed him in 1–A, and an appeal was taken and the classification of 1–A was sustained. Now, mind you, the 4–D classification was never sustained, but the 1–A was sustained twice on appeal. That does not mean that the board acted without any proper basis. Frankly, it seems to me on the record that the board as it acted finally on August 10th, 1944, no matter what the particular thing which brought the case again to its attention was, it was the letter that you pointed out, and it probably was [illegible] that the question of intent was considered, that did not limit the board in what it might examine. I had the whole file before it, and certainly on the basis of that young man's statement alone,

77 if I were sitting as an appellate board I would say that he had definitely indicated that at the time that he registered he had, if anything, a very slight and remote desire to enter the rabbinate, because he specifically said that what he wanted to do was to get a deferment in order to finish his course and become a psychiatric worker and then, "gaily, happily, and gladly he would come and give himself to his country."

Mr. KREEGER. Might I say to your Honor that all of those facts that your Honor has just covered were before the Local Board throughout the years.

The COURT. I don't care whether they were or not, the question is whether they were before the board on August 10th, 1944, and they were part of the record. In addition to that, the board had had its attention called to another indication, which might have been slight but still was an indication of what the board evidently believed, as did the city Selective Service group, went to the intent.

Now, if I were to sit here, as I say, as an appeal court, which I am not, I would say that certainly I am convinced that this young man was not genuine—from his own statement, definitely

78 not, in a three-page long statement in which he referred to the fact that he was a potential cantor, that he was a potential worker around the synagogue, but that his main idea was to serve humanity as he had self-sacrificingly served humanity for three years, by becoming ultimately a psychiatric social worker, with no mention of his ambition to be a rabbi and only the desire in his heart to secure a deferment for two years which would enable him to achieve his ambition and then he would come back gladly. If I were sitting as an appellate board——

Mr. KREEGER. Which you are not doing.

The COURT. I would say certainly there is evidence there to justify the Draft Board in its classification; and looking over the whole record as I do, and finding that although the board was uncertain, it finally did arrive at a determination; I find that the board did have a proper basis for determination and that they evidently, by their classification of 1-A, which was sustained on appeal, believed that he was not in good faith studying for the rabbinate, and I shall therefore dismiss the writ. You may have an exception to my ruling.

79 (Which exception is hereby allowed and sealed accordingly.) (Sealed.)

Mr. KREEGER. And, your Honor, we are directed to take an appeal in this case by the client to the Circuit Court of Appeals for the Third Circuit.

The COURT. I have tried to make it as easy as possible for that purpose so that it might be taken to the Court, and I shall give you findings of fact and conclusions of law, so that that appeal may be perfected.

Mr. KREEGER. Will the man be retained in the jurisdiction until the appeal is determined?

The COURT. He will be held at Camp Dix.

80 In United States District Court, District of New Jersey

IN THE MATTER OF THE APPLICATION OF HARRY HOROWITZ FOR A WRIT OF HABEAS CORPUS

On Petition No. C-5003.

Appearances: Thorn Lord, Esq., United States Attorney; by Joseph B. Schwartz, Esq., Assistant United States Attorney. Meyer Kreeger, Esq., Member of New York Bar; Willner & Willner, Esqs., by Herman Willner, Esq., Of Counsel, For Relator.

Findings of fact and conclusions of law

Filed June 7, 1945

MEANEY, District Judge.

Findings of fact

This matter came on to be heard on the 16th day of April 1945, in the United States District Court for the District of New Jersey, in the City of Newark and State of New Jersey.

Martin Maury Horowitz, Order No. 972, was a registrant with Local Board No. 104, Bronx County, Bronx, New York. He filed answers to Questionnaire with the above Local Board on January 17, 1941, and filed simultaneously with the Questionnaire a supplemental statement. In the Questionnaire he answered under Series III, Question #2, that he attended City College, New York, and that his course of study was social science for a period of three years. In Series IV of said Questionnaire, under "Occupation or Activities" in answer to Question #6 he stated that he was a student preparing for psychiatric social work. In the supplemental statement the subject stated that he had dedicated himself to work of social service and requested a deferment until February 1943 in order to complete his studies, and would then be in a position to have saved enough money to tide him over after his years of service.

81

I find that in the Questionnaire and in the supplemental statement Martin Maury Horowitz gave his occupation for which he was preparing as a social worker, and not as a student preparing for the Rabbinate. In September 1937, Martin Maury Horowitz while attending City College of New York stated that his choice of vocation was that of a teacher, and secondly that of a Rabbi.

On May 2, 1944, he appeared before an Advisory Panel on Theological Classifications, which Panel determined he was not a bona fide Rabbinical Student. Martin Maury Horowitz on August 10, 1944, wass reclassified 1-A, and on August 24, 1944, was continued in 1-A after a hearing by the said Local Board. Another rehearing was had on September 5, 1944, and the subject again continued in 1-A. On an appeal to the Appeal Board, the Appeal Board on December 1, 1944, affirmed the finding of the Local Board and classified the subject 1-A.

Conclusions of law

Martin Maury Horowitz's entire case was reviewed by the Advisory Panel of Theological Classifications. Local Board No. 104 on August 10, 1944, reclassified the subject 1-A. The reclassification of 1-A continued after hearings on August 24 and September 5, 1944. The Appeal Board on December 1, 1944, affirmed the findings of the Local Board.

I find as a matter of law, that a full hearing was had before the Local Board and the Appeal Board with all
82 documents pertaining thereto and the entire Selective Service record, and that there was evidence before the Local Board and the Appeal Board justifying their classification.

I find as a matter of law, that the action of the Local Board in classifying the subject 1-A was neither arbitrary nor capricious.

I find that Martin Maury Horowitz has been given ample hearings before the Local Board and the Appeal Board by which he was classified 1-A, and that he was regularly inducted into the United States Army pursuant to the Selective Service Act of 1940, as amended from time to time, and that he is now properly inducted in the armed forces of the United States and ordered to Fort Dix, New Jersey, for processing.

The Writ of Habeas Corpus is hereby denied.

83 In United States District Court

[Title omitted.]

Order dismissing writ

Filed May 14, 1945

A writ of Habeas Corpus having been issued herein on the 26th day of March 1945 upon the duly verified petition of Harry Horowitz for and on behalf of his son, Martin Maury Horowitz, and a return having been made to said writ by General M. Pierson, Post Commanding Officer at Fort Dix, New Jersey, and the relator Harry Horowitz having filed his traverse to said matter and the matter coming on for hearing before this Court on April 16, 1945, and the Court having heard testimony of witnesses and the arguments of counsel and being of the opinion that a full hearing was had and afforded to the said Martin Maury Horowitz by his local Selective Service Board and Appeal Board and that there was ample evidence before the said local Selective Service Board and Appeal Board justifying the classification of said Martin Maury Horowitz so that he was regularly inducted into the United States Army pursuant to the Selective Training and Service Act of 1940 as amended;

It is therefore, on this 14th day of May 1945, ordered that the Writ of Habeas Corpus heretofore issued in this cause on March 26, 1945 be and the same is hereby dismissed.

[S] THOMAS F. MEANEY,
Judge, United States District Court.

84 In United States District Court

[Title omitted.]

Notice of Appeal

Filed, May 29, 1945

SIRS: Please take notice that Harry Horowitz, the relator herein, hereby appeals to the United States Circuit Court of Appeals, Third Judicial Circuit, from the order made in this proceeding by Hon. Thomas F. Meaney, Judge of the United States District Court, on the 14th day of May 1945, and filed in the office of the Clerk of the United States District Court for the District of New Jersey on the 14th day of May 1945, dismissing the Writ of Habeas Corpus issued in this cause on March 26, 1945, and said Harry Horowitz, the relator herein, hereby appeals from each and every part of said order, as well as from the whole thereof, on both questions of law and on questions of fact.

Dated May 29, 1945.

Yours, etc.

WILLNER & WILLNER, Esqs.,
594 Summit Avenue, Jersey City 6, N. J.
Attorney for Relator Harry Horowitz.

To THORN LORD, Esq.,
United States Attorney
For the District of New Jersey.
BENJAMIN F. HAVENS,
Clerk of the U. S. District Court,
For the District of New Jersey.

85 In United States District Court

[Title omitted.]

Designation of record

Filed Aug. 23, 1945

The following are hereby designated to constitute the Record on Appeal in the Above Case, it being intended in this designation to include all the pleadings, findings of facts, order, notice of appeal, all of the testimony and all of the exhibits:

1. Petition of Harry Horowitz.
2. Writ of Habeas Corpus.
3. Return to Writ.
4. Traverse.
5. Findings of Fact.
6. Order of Judge Meaney dismissing writ.

7. Notice of Appeal from Judge Meaney's order.

8. Complete transcript of testimony before Judge Meaney, taken April 16, 1945.

9. The entire file of the Local Board which was received and marked Government's Exhibit 1, at page 13 of the testimony.

10. Photostatic copy of Relator's Exhibits 1, 2, and 3.

Two copies of each of the above designated are attached hereto to form the Appellant's Record on Appeal, excepting that the exhibits, consisting of the Local Board file, are being photostated by the Clerk in duplicate and when so photostated will constitute a portion of this record.

Please note further that the above designation contains all of the pleadings, findings, order, proceedings, testimony, and exhibits in the case, so that there is nothing further to be added
86 by respondent to this designation. If by error the above designation should have excluded any portion of the papers on file, it is respectfully requested that the Clerk prepare two copies of the same for inclusion in the Record and charge the cost of such preparation to the relator.

WILLNER & WILLNER,
Attorneys for Relator-Appellant,
591 Summit Avenue, Jersey City, N. J.

To: WILLIAM H. TALLYN,
Clerk of the U. S. District Court,
District of New Jersey.

87 [Clerk's certificate to foregoing transcript omitted in printing.]

88 In United States Circuit Court of Appeals for the Third Circuit

Docket No. 8992

IN THE MATTER OF THE APPLICATION OF HARRY HOROWITZ FOR A WRIT OF HABEAS CORPUS

Order to show cause

Filed Oct. 10, 1945

On reading and filing the annexed affidavit of Meyer Kreeger, sworn to the 8th day of October 1945, and upon the writ of habeas corpus issued herein by Mr. Justice Meaney of the United States District Court for the District of New Jersey, and the petition on which it was granted, upon the Notice of Appeal and the Record on Appeal, and upon the brief for appellant and appendix filed in

this Court on the 28th day of September 1945, and upon all of the papers and proceedings herein had,

Let the respondent-appellee, Brigadier General Madison Pearson, Post Commanding Officer, Fort Dix, New Jersey, his representatives and aides who may have had the custody of Martin M. Horowitz up to October 8, 1945, show cause on Thursday, October 11, 1945, at 10:30 A. M. in the forenoon of that day, at the Courthouse, 9th and Chestnut Streets, Philadelphia, Pa., why an order should not be made herein, directing the return of the said Martin M. Horowitz, relator's son, to the jurisdiction of this Court, and why during the pendency of and until the determination of the appeal herein after the said return of relator's son to the jurisdiction of this Court the said Brigadier General Madison Pearson, Post Commanding Officer, Fort Dix, New Jersey, his representatives and aids who may then have the custody of the said Martin M. Horowitz should not be stayed, enjoined and restrained from removing or causing the said Martin M. Horowitz to be removed from the jurisdiction of this Court and/or the territorial limits of this Court.

89 Sufficient cause appearing therefor, let service of a copy of this order to show cause, together with the attached affidavit, upon the office of the U. S. Attorney in Trenton, New Jersey, on or before 2 P. M. o'clock of Wednesday, October 10, 1945, be deemed good and sufficient service.

Dated: Philadelphia, Pa., October 10, 1945.

GOODRICH,
U. S. Circuit Court Judge
For the Third Circuit.

90 In United States Circuit Court of Appeals

[Title omitted.]

Affidavit of Meyer Kreeger

Filed Oct. 10, 1945

Meyer Kreeger, being duly sworn, deposes and says:

1. That he is of counsel for the above named relator-appellant and makes this affidavit in support of the within Order to Show Cause to direct the return of relator's son to the jurisdiction of this Court.

2. That relator's son, Martin M. Horowitz, a student preparing for the rabbinate in a recognized theological seminary on the Selective Service List was inducted into the Armed Forces of the United States.

3. That on relator's application a writ of habeas corpus was

obtained, signed by Mr. Justice Meaney of the United States District Court for the District of New Jersey. After the hearing the writ was dismissed and Findings of Fact and Conclusions of law were entered on June 7th, 1945. At the close of the hearing the Court directed (SM 61) that relator's son be continued in custody at Fort Dix, New Jersey until the determination of the Appeal.

4. That because of the decision favorable to a relator by the Circuit Court of Appeals, Second Circuit in the case of U. S. ex rel Levy v. Cain, 149 Fed. (2d) 338, deponent was advised by Mr. Hull, the Assistant U. S. Attorney for New Jersey, that the file in this case, as well as in a number of similar cases in
91 which deponent is counsel, was requested by and sent down to Washington during the summer for review with the possibility that the rule of the Second Circuit might be applied to this case. Because of that, it was agreed to withhold filing of the record until Washington determined its policy.

5. That on August 10, 1945, deponent was advised by Mr. Hull that Washington had decided to contest the appeal. His language is as follows:

"Referring to the above case, you are now advised that we have decided to contest the appeal. We desire that you proceed promptly, and, for the reason that the appellant's military status remains unsettled, that you comply in full with the time limitations of the rules of the Third Circuit Court."

6. That accordingly, deponent caused two copies of the record to be filed on August 30, 1945, and on September 28, 1945, the appellant's brief and appendix were filed in this Court and copies served upon the U. S. Attorney in New Jersey.

7. That during all of this time the said Martin M. Horowitz, relator's son, was kept in custody at Fort Dix pursuant to the lower court's original order.

8. That deponent has been advised this day by telephone call from the said Martin M. Horowitz that he has been shipped away from Fort Dix and outside of the jurisdiction of this Court.

8. That deponent has telephoned the Second Army Command and spoken to Major Carey, and was advised that Martin M. Horowitz was shipped to a camp which is outside of the territorial limits of this Circuit. Deponent has also spoken to Mr. Hull, the Assistant U. S. Attorney, and was similarly apprised of the same fact. Both Mr. Hull and Major Carey stated orally that Martin M. Horowitz would be returned to the jurisdiction of this court immediately upon the order of this Court at any time.

92 9. Deponent also spoke, today, to Major Samuel Beech of the Judge Advocate General's office in Washington, D. C., who also stated that if the Court should make a direction to that

effect Martin M. Horowitz would be returned immediately to the jurisdiction of the Third Circuit.

10. That deponent has been further advised this day that Martin M. Horowitz has been removed to Camp Belvoir, Virginia, which is outside of the territorial jurisdiction of this Court.

11. That the rights of the relator-appellant herein has been impaired by the removal from this jurisdiction for it may make his case entirely moot under the authority of the United States Supreme Court in the case of U. S. ex rel Lynn v. Downer, 322 U. S. 756; rehearing denied 65 S. Ct. 426, where it was held that a removal of the soldier in a similar case from the jurisdiction rendered the question moot and thus prevented relator in that case from obtaining a final determination of his case.

12. That Rule 17 of this Court, subdivision 4, specifically says: "The initial order respecting the custody or enlargement of the prisoner pending review, as also any recognizance taken, shall be deemed to cover not only the review in this court but also the further possible review in the Supreme Court; and only where special reasons therefor are shown to this court will it disturb that order, or make any independent order in that regard."

13. That this Court has made no order in that regard in this case respecting custode, nor has any further order been made or entered, to the best of deponent's knowledge, by the lower court.

14. That if the Army authorities be allowed to remove relator's son in this case from the jurisdiction of this Court and to keep him so removed in the State of Virginia, where deponent is advised and verily believes he is at present, then the same Army
93 authorities can continue to remove him to any other portion of the country and make it impossible for the relator to obtain a final determination of his case. That such a practice would result in obtaining writ after writ in the various jurisdictions to which the man is moved and would make the remedy of habeas corpus practically futile.

15. That in view of the fact that this appeal can be heard in November, as the appellee's brief will be due on October 18th, 1945, and in view of the fact that the Government is prepared to return the man to this jurisdiction if the Court so orders, deponent respectfully asks this Court for an order directing the respondent-appellee to return relator's son, Martin M. Horowitz forthwith to the jurisdiction of this Court.

16. That deponent makes this affidavit in person because he is acquainted personally with the facts herein stated.

17. That no previous application has been made for this or similar relief to any other Court or Judge.

18. That because of all of the above, deponent moves by way of an Order to Show Cause and respectfully asks that this Order be made returnable Thursday, October 11, 1945.

MEYER KREEGER.

Sworn to before me this 8th day of October 1945

[SEAL] MAX L. FINKLESTEIN.

[File endorsement omitted.]

94 In United States Circuit Court of Appeals
[Title omitted.]

Order assigning judge

Filed Oct. 11, 1945

And now, to wit: this 11th day of October A. D. 1945, it is ordered that Hon. Albert Lee Stephens, U. S. Circuit Judge, for the Ninth Circuit be, and he is hereby assigned to sit in above case in order to make a full court.

GOODRICH, *Circuit Judge.*

95 In the United States Circuit Court of Appeals
[Title omitted.]

Minute entry

And afterwards, to wit, the 11th day of October 1945, come the parties aforesaid by their counsel aforesaid, and this case being called for hearing on Appellant's Motion for Rule to Show Cause, before the Honorable Herbert F. Goodrich, Honorable Albert Lee Stephens and Honorable Gerald McLaughlin, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the 22d day of October 1945, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

96 In United States Circuit Court of Appeals

[Title omitted.]

Order Denying Application for Return of Relator's Son to This Jurisdiction and for Injunction, etc.

Filed Oct. 22, 1945

Before ALBERT LEE STEPHENS, GOODRICH, and MCLAUGHLIN, Circuit Judges

On this 22nd day of October 1945, the application for return of relator's son, Martin M. Horowitz, to the jurisdiction of this Court, and for injunction, enjoining and restraining Brigadier General Madison Pearson, Post Commanding Officer, Fort Dix, New Jersey, his representatives and aides from removing said Martin M. Horowitz from the jurisdiction of this Court is herewith ordered denied.

[File endorsement omitted.]

GOODRICH, *J.*

97 In the United States Circuit Court of Appeals

[Title omitted.]

Minute entry

And afterwards, to wit, the 9th day of November 1945, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Albert B. Maris, Honorable Herbert F. Goodrich and Honorable John J. O'Connell, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the 15th day of November 1945, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

98 In United States Circuit Court of Appeals for the Third Circuit

No. 8897—October Term, 1945

UNITED STATES EX REL. JACOB S. SAMUELS, APPELLANT

v.

GENERAL MADISON PEARSON, POST COMMANDING OFFICER, FORT DIX, NEW JERSEY

No. 8992—October Term, 1945

UNITED STATES EX REL. HARRY HOROWITZ, APPELLANT

v.

GENERAL MADISON PEARSON, POST COMMANDING OFFICER, FORT DIX, NEW JERSEY

Appeals From Orders of the District Court of the United States for the District of New Jersey

Argued November 9, 1945

Before MARIS, GOODRICH, and O'CONNELL, Circuit Judges

Opinion of the Court

Filed November 15, 1945

PER CURIAM.

The relators in these two cases claimed exemption from military training and service under the Selective Service Act. The claim of each was based upon the asserted fact that he was
99 a student preparing for the ministry. The local board of each at first granted him exemption but, after receiving from the New York City Director of Selective Service the statement and recommendation of a "advisory panel on theological classifications" and after further proceedings not necessary here to relate, cancelled his exemption and reclassified him in Class IA. Each was subsequently inducted into the army and then sued out a writ of habeas corpus in the district court, which after hearing that court discharged. The present appeals followed.

In each of these cases, as in the case of United States ex rel. Levy v. Cain, 149 F. 2d 338 (C. C. A. 2, 1945), the membership of the "advisory panel" was cloaked in anonymity, its statement not being signed, and the identity of its membership not being disclosed to the relator or appearing in the record of the proceedings before the local board. In each case it made through the New York City Director of Selective Service a recommendation to the local board as to the action which the board should take.

We fully agree with the conclusion reached by the Circuit Court of Appeals for the Second Circuit that the interjection of the statement and recommendation of the "advisory panel" into the proceedings of the local boards vitiated those proceedings and rendered the relators' reclassification and induction invalid. The reasons for this conclusion are stated in Judge Learned Hand's opinion in the cited case with such clarity and force as to require no amplification by us.

Accordingly in each case the order of the district court is reversed and the cause is remanded to that court with directions to discharge the relator from military custody, without prejudice to further lawful proceedings under the Selective Service Act in his case.

100 In the United States Circuit Court of Appeals
for the Third Circuit

No. 8992—October Term, 1945

UNITED STATES OF AMERICA, EX REL HARRY HOROWITZ, APPELLANT

vs.

GENERAL MADISON PEARSON, POST COMMANDING OFFICER, FORT DIX, NEW JERSEY

Judgment

Filed Nov. 15, 1945

Present MARIS, GOODRICH, and O'CONNELL, Circuit Judges

On appeal from the District Court of the United States, for the District of New Jersey

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of New Jersey, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, and the cause is remanded to that court with directions to discharge the relator from military custody, without prejudice to further lawful proceedings under the Selective Service Act.

By the Court,

MARIS, *Circuit Judge.*

NOVEMBER 15, 1945.

[File endorsement omitted.]

101 In United States Circuit Court of Appeals for the
Third Circuit

[Title omitted.]

Petition for recall of mandate, etc.

Filed Dec. 12, 1945

Edgar H. Rossbach, United States Attorney for the District of

New Jersey, by Grover C. Richman, Jr., Assistant United States Attorney, respectfully shows that:

1. On or about May 14, 1945, by virtue of an Order of that date entered in the United States District Court for the District of New Jersey by Honorable Thomas F. Meaney, Judge, a Writ of Habeas Corpus heretofore issued in this cause on March 6, 1945, was dismissed.

2. Thereafter, Harry Horowitz, the Relator-Appellant, perfected his appeal in this Court and on November 15, 1945, by its opinion of that date, this Court reversed the aforesaid Order of the District Court and remanded the cause to the United States District Court for the District of New Jersey, and to that end a Mandate has been filed with the Clerk of the United States District Court for the District of New Jersey.

3. Consideration is presently being given to the advisability of making application to the Supreme Court of the United States for a Writ of Certiorari, in order to review a decision of this Court referred to above.

Your petitioner therefore prays that an Order be entered, nullifying the Mandate heretofore filed with the Clerk of the
102 United States District Court for the District of New Jersey, and that this cause be returned to this Court so that the proceedings contemplated may be perfected.

Your petitioner further prays that an Order to Show Cause issue, directed to the Relator-Appellant, requiring him to show cause before this Court as to why such relief should not be granted.

Edgar H. Rossbach,
EDGAR H. ROSSBACH,
United States Attorney.
By Grover C. Richman, Jr.,
GROVER C. RICHMAN, JR.,
Assistant United States Attorney.

103 [*Duly sworn to by Grover C. Richman, Jr.; jurat omitted in printing.*]

[File endorsement omitted.]

104 In United States Circuit Court of Appeals

[Title omitted.]

Order to show cause

December 12, 1945

Present: MARIS and GOODRICH, JJ.

Upon motion of Edgar H. Rossbach, United States Attorney for the District of New Jersey, by Grover C. Richman, Jr., As-

sistant United States Attorney, and having read the duly verified petition filed herein,

It is, on this 12th day of December 1945, ordered that Harry Horowitz, the Relator-Appellant herein, show cause before this Court on the 7th day of January 1946 at the Federal Building, Ninth and Chestnut Streets, Philadelphia, Pennsylvania at 10.30 A. M. in the forenoon or as soon thereafter as counsel may be heard, as to why an Order should not issue directing the Clerk of the United States District Court for the District of New Jersey to return the above entitled cause to this Court and as to why the Mandate heretofore filed with said Clerk should not be nullified.

It is further ordered that copies of the Petition filed herein, and this Order, which may be certified as true by the United States Attorney, be served upon the attorney for Harry Horowitz, the Relator-Appellant, not more than — days after the entry of this Order.

By the Court.

MARIS,
Judge, United States Circuit Court of Appeals for the Third Circuit.

105 In United States Circuit Court of Appeals

[Title omitted.]

Order dismissing rule to show cause

Filed Jan. 24, 1946

Upon motion of Edgar H. Rossbach, United States Attorney, by Grover C. Richman, Jr., Assistant United States Attorney, and Meyer Kreeger, of counsel with the relator, consenting thereto;

It is on this 24th day of January 1946 ordered that the rule to show cause heretofore entered on the 12th day of December 1945, be and the same is hereby dismissed without prejudice or costs to either party.

GOODRICH,
Judge, United States Circuit Court of Appeals for the Third Circuit.

We consent to the entry of the within order.

MEYER KREEGER,
Attorney for the Relator.

EDGAR H. ROSSBACH,
United States Attorney.

By GROVER C. RICHMAN, Jr.,
Assistant United States Attorney.

[File endorsement omitted.]

106 In United States Circuit Court of Appeals

[Title omitted.]

Order amending this court's judgment entered Nov. 15, 1945 and recalling mandate

Present: MARIS, GOODRICH, and O'CONNELL, Circuit Judges

It is hereby ordered that the mandate in the above entitled cause issued to the District Court of the United States for the District of New Jersey on December 3, 1945, be and the same is hereby recalled.

It is further ordered that the judgment of this court entered on November 15, 1945, be and the same is hereby amended to read as follows:

"This cause came on to be heard on the transcript of record from the District Court of the United States for the District of New Jersey, and was argued by counsel.

"On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, and the cause is remanded to that court with directions to discharge the relator's son, Martin Maury Horowitz, from military custody, without prejudice to further lawful proceedings under the Selective Service Act."

By the Court.

MARIS,
Circuit Judge.

FEBRUARY 6, 1946.

107 [Clerk's certificate to foregoing transcript omitted in printing.]

108 In the Supreme Court of the United States

Order extending time within which to file petition for certiorari

On consideration of the motion of the Solicitor General in the above-entitled cause, and good cause therefor having been shown, it is now hereby ordered that the time within which a petition for writs of certiorari may be filed herein be and the same is hereby extended for a period of 30 days from February 15, 1946.

Dated this 12th day of February 1946.

HAROLD H. BURTON,
Associate Justice of the Supreme Court of the United States.

U. S. GOVERNMENT PRINTING OFFICE: 1946

Supreme Court of the United States

Order allowing certiorari

Filed May 27, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice JACKSON took no part in the consideration or decision of this application.

CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 59

GENERAL LELAND S. HOBBS, POST COMMANDING OFFICER, FORT DIX, NEW JERSEY, PETITIONER

vs.

UNITED STATES EX REL. JACOB S. SAMUELS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 13, 1946
CERTIORARI GRANTED MAY 27, 1946

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. —

GENERAL MADISON PEARSON, POST COMMANDING OFFICER, FORT DIX, NEW JERSEY, PETITIONER

vs.

UNITED STATES, EX REL. JACOB S. SAMUELS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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1 In United States District Court
District of New Jersey

Civ. 4617

IN THE MATTER OF THE APPLICATION OF JACOB S. SAMUELS FOR A WRIT OF HABEAS CORPUS

Docket entries

Jan. 25, 1945—Petition for Writ of Habeas Corpus filed.
Jan. 25, 1945—Writ of Habeas Corpus issued with allocatur (Rice).
Jan. 27, 1945—Copy of Writ with Marshal's return thereon filed.
Feb. 2, 1945—Hearing on Writ of Habeas Corpus. Ordered motion for an order releasing the Petitioner from the custody of the Military Authorities—DENIED. Decision Reserved. Briefs to be filed (Rice).
Feb. 2, 1945—Writ of Habeas Corpus returned.
Feb. 2, 1945—Return on Writ of Habeas Corpus, filed (J. T. Daly, Lt. Col.).
Feb. 2, 1945—Return on Writ of Habeas Corpus, filed (U. S. Atty.).
Feb. 2, 1945—Traverse, filed.
Feb. 13, 1945—Transcript of Testimony, filed.
Feb. 19, 1945—Memorandum, filed (Rice) (Dismissing petition and quashing writ).
Mar. 9, 1945—Order dismissing Writ of Habeas Corpus, filed (Rice).
Mar. 22, 1945—Notice of Appeal, and acknowledgment of service, filed.
June 27, 1945—Consent Order extending time to file record on appeal to 7/30/45, filed (Fk) (Copy sent U. S. C. C. A.).
June 27, 1945—Order vacating order extending time to file record on Appeal, filed (Fk).
Aug. 22, 1945—Designation of Contents of Record on Appeal.
Aug. 23, 1945—Certified copy of order of U. S. C. C. A. extending time to file record on Appeal to 8/31/45 filed.

2 In United States District Court

[Title omitted.]

Designation of record

The following are hereby designated to constitute the Record on Appeal in the above case, it being intended in this designation

to include all the pleadings, opinion of the court, order, notice of appeal, all of the testimony, and all of the exhibits:

1. Petition of Jacob Samuels.
2. Writ of Habeas Corpus.
3. Return to the Writ of Habeas Corpus.
4. Additional return to the Writ.
5. Traverse.
6. Opinion of Judge Rice (Memorandum).
7. Order of Judge Rice.
8. Notice of Appeal.
9. Complete transcript of testimony before Judge Rice taken February 2, 1945.
10. The entire file of the Local Board which was incorporated by reference as part of the return, including the two documents offered as exhibits by relator and marked Relator's Exhibit P–1 and Exhibit P–2.

Two copies of each of the above designated are attached hereto to form the appellant's Record on Appeal, excepting the exhibits consisting of the file of the local board and relator's exhibits P–1 and P–2 which are being photostated by the Clerk of the District Court in duplicate and when so photostated will constitute a portion of this record.

3 Please note further that the above designation contains all of the pleadings, opinion, order, proceedings, testimony and exhibits in the case, so that there is nothing further to be added by respondent to this designation. If by error the above designation should have excluded any portion of the papers on file, it is respectfully requested that the Clerk prepare two copies of the same for inclusion in the record and charge the cost of such preparation to the relator.

GEORGE M. EICHLER,
Attorney for Relator-Appellant,
26 Journal Square, Jersey City, N. J.

To: WILLIAM H. TALLYN,
Clerk of U. S. District Court,
District of New Jersey.

4 In the United States District Court

[Title omitted.]

Petition

Filed Jan. 25, 1945

To the Honorable District Court of the United States for the District of New Jersey:

Your petitioner, Jacob S. Samuels, respectfully represents and

shows to this Honorable Court that he is a citizen of the United States and a resident of the State of New York; that he is unjustly and unlawfully detained at Fort Dix, New Jersey, a military fort of the United States by virtue of an induction into the armed forces of the United States pursuant to an order of induction issued under the Selective Training and Service Act of 1940 by Local Draft Board #193 of Kings County of the State of New York, 260 Broadway, Brooklyn, New York, ordering him to report for induction on December 20, 1944; that pursuant thereto, he was delivered to the military authorities at Fort Dix, New Jersey on December 26, 1944.

Your petitioner further respectfully represents and shows to this Honorable Court that at the time the said order of induction was issued by the said draft board, your petitioner was—

(a) a student at a theological or divinity school known as Mesifta Talmudical Seminary located at 141 South 3rd Street, Brooklyn, New York, preparing for the orthodox Hebrew ministry;

5 (b) that the said Mesifta Talmudical Seminary is a theological or divinity school which has been recognized as such for more than one (1) year prior to December 16, 1940;

(c) that at the time of his induction, your petitioner was, in good faith, pursuing the prescribed course that would have, when completed, prepared him for the Hebrew rabbinate or ministry;

(d) that the Selective Training and Service Act of 1940 in Section 5 (d) thereof, provides that regular or ordained ministers of religion and students who are preparing for the ministry in theological or divinity schools recognized as such for more than one (1) year prior to December 16, 1940, shall be exempt from training and service under the Act;

(e) That the Selective Service regulations (Section 622.44) promulgated by the President of the United States under the said Act provides for IV–D classification for a minister of religion or divinity student and for his deferment from training and service by reason of such status.

Your petitioner further represents that the said draft board, with full knowledge of petitioner's status, originally classified him in IV–D but not withstanding the protest and objection of petitioner reclassified him in Class 1A, a classification applicable to men referred to as "available for military service."

Thereafter, your petitioner promptly appealed from the said 1A classification to an appeal board, pursuant to said regulations, but his appeal was denied.

6 Your petitioner further represents that by reason of the facts and the law the said draft board was without power to order the induction of your petitioner in the armed forces of

the United States; and that by reason thereof, your petitioner's detention at Fort Dix is unjust and unlawful.

Wherefore, to be relieved of said unlawful and unjust detention, your Petitioner prays that a writ of habeas corpus to be directed to General M. Pierson, Post Commanding Officer at Fort Dix, may issue in his behalf so that your petitioner may be forthwith brought before this Court to do, submit to, and receive what the law may direct.

(S) JACOB S. SAMUELS,
Petitioner.

(S) GEO. M. EICHLER,
Attorney of Petitioner.

December 27, 1944.

7 [*Duly sworn to by Jacob S. Samuels; jurat omitted in printing.*]

8 In United States District Court

Writ of habeas corpus

Filed Feb. 2, 1945

The United States of America to:

General M. PIERSON, *Post Commanding Officer, Fort Dix, New Jersey, Greeting:*

It is hereby commanded that you be and appear before the Honorable Eugene Rice, Judge of the United States District Court at the United States District Courtroom, Federal Building in the City of Newark, New Jersey, on the 2nd day of February 1945 at 11:00 A. M., and have with you the body of Jacob S. Samuels, of New York, New York, now in your custody; that you certify and make known the true cause of the detention of the said Jacob S. Samuels; that you then and there do whatsoever the said Judge shall determine concerning you in this behalf, according to law; and that you have then and there this writ.

Witness, the Honorable Eugene Rice, Judge of the United States District Court for the District of New Jersey.

WILLIAM H. TALLYN,
Clerk.

Per EDYTHE G. BAUM,
Deputy Clerk.

Issued January 25, 1945.
The Writ is allowed—1/25/45.

EUGENE RICE, *U. S. D. J.*

9 United States District Court

[Title omitted.]

Return on writ of habeas corpus

Filed Feb. 2, 1945

To the Honorable EUGENE RICE, *Judge of the United States District Court for the District of New Jersey:*

The respondent, Brigadier General Madison Pearson, Commanding General, Fort Dix, New Jersey, upon whom has been served a writ of habeas corpus for the production of Jacob S. Samuels, respectfully makes return and states that he holds the said Jacob S. Samuels by authority of the United States as a soldier in the Army of the United States, the said Jacob S. Samuels having been duly and regularly inducted therein on or about December 26, 1944, under the provisions of the Selective Service Training Act of 1940, and amendments thereto.

Obedient, however, to the mandate of said writ, the respondent herewith produces before the Court the body of said Jacob S. Samuels.

Annexed hereto and made a part hereof is the Local Board File.

Your respondent prays this Honorable Court to dismiss the writ.

(S) Madison Pearson,
MADISON PEARSON,
Brigadier General, U. S. A.,
Commanding Fort Dix, N. J.

10 In United States District Court

[Title omitted.]

Return on writ of habeas corpus

Filed Feb. 2, 1945

To the Honorable District Court of the United States for the District of New Jersey:

General M. Pierson, Post Commanding Officer, Fort Dix, New Jersey, respectfully shows:

That he holds Jacob S. Samuels by authority of the statutes of the United States, as a member of the United States Army, the said Jacob S. Samuels having been lawfully selected and inducted

under the provisions of the Selective Training and Service Act as amended 50 U. S. C. A. Appendix Section 301 et seq. in that the said Jacob S. Samuels then and there being a registrant of Local Board No. 193, Kings County of the State of New York, 260 Broadway, Brooklyn, New York, was duly classified on August 22, 1944, in Class 1-A by said Board, and that thereafter, said classification was affirmed by the Board of Appeal. Subsequently, said Jacob S. Samuels was ordered to report for induction by said Local Board on December 20, 1944, and thereafter was inducted into the United States Army and the Selective Service file of said Local Board is attached hereto and made a part of this return.

And your respondent makes return of these facts which he tenders himself ready to prove as shall be required to the Court, and that such disposition of the case may be made as shall be right.

(S) MADISON PEARSON,
Brig. General, U. S. A.,
Commanding Fort Dix, N. J.

By JOHN T. DALY,
Lt. Col. J. A. G. D.,
Post Judge Advocate.

(S) Thorn Lord,
THORN LORD,
United States Attorney.

By (S) CHAS. A. STANZIALE,
Assistant United States Attorney.

11 In United States District Court

[Title omitted.]

Traverse to return

Filed Feb. 2, 1945

Petitioner denies the allegations contained in the return and reiterates all facts stated in the petition filed herein in his behalf as reasons why such detention is not warranted in law.

(S) JACOB S. SAMUELS,
Petitioner.

(S) GEORGE M. EICHLER,
Attorney of Petitioner.

[*Duly sworn to by Jacob S. Samuels; jurat omitted in printing.*]

13 In United States District Court

District of New Jersey

Civil 4617

JACOB S. SAMUELS, PETITIONER

vs.

BRIGADIER GENERAL MADISON PEARSON, POST COMMANDING OFFICER, FORT DIX, RESPONDENT

Reporter's transcript of proceedings

NEWARK, N. J., *Friday, February 2, 1945.*

Before Hon. EUGENE RICE, U. S. D. J.

Appearances: George M. Eichler, Esq., and Meyer Kreeger, Esq., of the New York Bar, for the petitioner. Charles A. Stanziale, Esq., Assistant United States District Attorney, for the respondent.

14 Mr. STANZIALE. If your Honor please, at this time I would like to file with the Court the return on the writ of habeas corpus in the matter of Jacob S. Samuels. This is on a writ of habeas corpus issued to produce the body of this defendant before the Court this morning. With my return on the writ of habeas corpus I make a part of the return the selective service file in the matter.

The COURT. Do you have your returns?

Mr. STANZIALE. Yes. I have a return by Madison M. Pierson individually and also the same return, including more facts, attested to by our office as appearing for the Brigadier General.

Mr. EICHLER. I have not seen the return yet, your Honor.

The COURT. I think that probably I should read the return. I have not read it. This matter was set for eleven. I thought it would be eleven before we could reach it.

Mr. EICHLER. Surely.

The COURT. And I think I will just return to the chambers and read the return.

Mr. EICHLER. All right, your Honor. I have a traverse here to the return, and of course I think I should file it with your
15 Honor then as the answering pleading, and then we are at issue.

The COURT. I will be in here by eleven o'clock. There will be a recess until eleven.

Mr. EICHLER. If your Honor please, there was one thing about the memorandum, a slight modification. Your Honor will recall I filed a memorandum with you in this matter. In the facts where I state that Samuels took up his prerabbinate course in the Yeshivah Torah Vodaath, actually he took it up in the Mesifta Talmudical Seminary. In other words, the theological school that he was going to at the time he was inducted was also the same school where he took up his prerabbinate course. That is the only change.

(A short recess is taken.)

Mr. STANZIALE. Your Honor, may the record show that in obedience to the writ there has been produced before the Court this morning Jacob S. Samuels.

(The relator stands up in the court room.)

The COURT. All right. You may have a seat there or come around inside, either one, as you may desire.

Mr. EICHLER. Are you ready?

Mr. STANZIALE. I am ready, Mr. Eichler.

Motion for release of petitioner.

Mr. EICHLER. If your Honor pleases, first I would like to make a motion. I would like to make a motion at this time that
16 based upon the petition for the writ of habeas corpus, the return of the petition and the traverse, which are the pleadings in this application, we find that there is no contradiction or denial of the facts set forth in the petition by the return itself. The return merely asserts that the petitioner was inducted into the armed forces pursuant to the law after an order of induction had been issued by the local draft board, that none of the facts as set forth in the petition or the law set forth therein accompanying the facts are in any way contradictory, and therefore based on the law, which provided for exemption of theological students, assuming the facts in the petition have not been denied, and those are the facts asserted, it occurs to me there isn't any need to take any testimony before your Honor. My motion is therefore that your Honor make an order releasing this man from the custody of the military authorities.

The COURT. Overruled.

Mr. EICHLER. Your Honor will permit me an exception.

The COURT. Yes.

(Which exception is hereby allowed and sealed accordingly.) (Sealed.)

Mr. EICHLER. First of all, for the record I would like to make a statement that the Mesifta Talmudical Seminary is a theo-
17 logical or divinity school which has been recognized as such for more than one year prior to December 16, 1940. As I

understand it, Mr. Stanziale will not dispute that statement of fact.

Mr. STANZIALE. If your Honor please, let the record show that the government does not take the position that this school is not a recognized school for rabbinical purposes. However, I want the record to show that on the representation of counsel that he will have some member of the school here for the purpose of my asking any questions, not in regard to whether the school is a recognized school or not, but in regard to other matters which I believe are pertinent to the issue; is that correct, Mr. Eichler?

Mr. EICHLER. Yes, sir.

Mr. STANZIALE. Very well. As far as I know, your Honor, this school is on the list of qualified seminaries issued by the Director of Selective Service.

Mr. EICHLER. We expected to have that today for your Honor this morning, but unfortunately we have not been able to produce it.

Now, may I present to your Honor Mr. Meyer Kreeger, a member of the New York Bar, who is my associate counsel in these proceedings, and with your Honor's permission he will directly examine one or two of the witnesses in this matter.

The COURT. All right.

18 RABBI LOUIS WELLER, called and sworn on behalf of the petitioner, testified as follows:

Direct examination by Mr. KREEGER:

Q. Are you an orthodox rabbi, Rabbi Weller?—A. Yes, sir.

Q. Are you a member of the Union of Orthodox Rabbis of the United States and Canada?—A. Yes, sir.

Q. Are you on the Executive Committee of that organization?—A. Yes, sir.

Q. Is the Union of Orthodox Rabbis of the United States and Canada the highest religious authority for orthodox Jews in the United States?—A. Yes, sir.

Q. And were you instructed by the officers of the Union of Orthodox Rabbis to appear this morning in connection with this case?—A. Yes.

Q. Are you acquainted with the institution known as the Mesifta Talmudical Seminary?—A. Yes, sir.

Q. Does it also have a Hebrew name known as Torah Vodaath?—A. Yes.

Q. Is that an orthodox rabbinical seminary?—A. Certainly.

Q. How long has that been in existence as an orthodox rabbinical seminary, to your knowledge?—A. I am here in the Union of Orthodox Rabbis, I am here since I am over to this country.

19 Q. How long is that?—A. About twenty years.

Q. And during that period of time have you known of this institution as an orthodox rabbinical seminary?—A. Yes, sir.

Q. Do you know of your own knowledge whether during that period of time it has been recognized as an orthodox rabbinical seminary by the Union of Orthodox Rabbis of the United States and Canada?—A. Since I am a member there what I can remember, always on the conventions we hold, this seminary is well recognized as a rabbinical seminary and we appeal always for help, and so on.

Q. So that, Rabbi Weller, during this period of time the Union of Orthodox Rabbis has recognized the Mesifta Talmudical Seminary as a rabbinical seminary?—A. Right.

Mr. KREEGER. That is all.

Cross-examination by Mr. STANZIALE:

Q. Rabbi Weller, this rabbinical seminary gives religious instructions in the faith of Judea; is that correct?—A. Sure.

Q. To what students is it open?—A. To what students?

Q. Students; yes.—A. We have two departments. The Mesifta Talmudical Seminary is open for the higher students and to learn there they have several grades there until they are coming to the highest grade and they get ordained.

20 Q. Now, you say several grades. What are the grades? What grades does it have?—A. It is not the number, but for instance——

Q. What classification, in other words?—A. That is right. It is according when a boy comes to that school, before he goes to parochial school. When he is graduating the parochial school he is about fourteen years old, about, or thirteen years old, because it is the elementary school comes together in the parochial school. Then since then they have about eight grades. When the boys are coming in every grade, he studies there a year if he is all right. Otherwise he might stay a year and a half, but at least a year. Then when he comes after finish up all the eight grades, and then they are taking up the rabbinical code called the Shulchan Oruch, which this is necessary for an orthodox rabbi to know, and these are the grades.

Q. At what age may they enter the rabbinical shool?—A. At what age?

Q. Yes.—A. It is according to the ability of the person. It cannot be less than—even if he is a genius, he cannot be there before eighteen years.

Q. I mean, what is the earliest age that a person may start to go to Mesifta school or seminary?—A. The Mesifta School, can start as early as fourteen years even.

Q. Fourteen years?—A. Because it comes gradually
21 after the parochial school.

Q. Then the course is for how long if a person should start at fourteen years, before he studies or takes courses to become an ordained rabbi?—A. Before?

Q. Yes. For how long is the course?—A. For how long?

Q. Yes.—A. It might be to eight years, and it might be nine years. It is according to the person. There is a school—I beg your pardon.

Q. Surely.—A. We have several rabbinical seminaries here in New York. Some seminaries is like they are not conservatives, but the knowledge that a person has to get to get ordained is not as hard as in this place. For instance, here he must know what we call it the Seder Talmud. It is a certain number of books of Talmud. Otherwise we will not recognize him to know the code of the law, because we don't want he shall know the law from short. He shall know the root of the law, and practically this seminary is a seminary which is very strict, and one who is getting ordained from this school is more recognized in knowledge more than any other school.

Q. Let me ask you this, Rabbi Weller. For how long is the course to become an ordained rabbi?—A. For how long?

Q. Yes. Is there any specific number of years?—A. Any period of years. If a person is fair, it has to take him about eight years.

22 Q. Eight years?—A. At least.

Q. That is, to prepare himself to become an ordained rabbi?—A. That is right. Not to prepare himself. I mean, if he is all right, he can in the eight years, he can also, he can come out as an ordained rabbi. Maybe one who is not—one who is not so fair brains, he takes a year later.

Q. Let me ask you this. There is a difference between a rabbi and an ordained rabbi, isn't there?—A. I wouldn't say so, sir.

Q. Well, isn't a person that is learned in the Talmud and the Jewish laws considered a rabbi, a teacher?—A. I beg your pardon?

Q. I don't know. I want you to tell me.—A. If you will allow me, I will tell you.

Q. Yes.—A. This is our curse in this country, because a man who teaches children, the public being ignorant a little in the religious knowledge, so they call him rabbi. One who is performing a wedding ceremony, they are calling rabbi. So I wouldn't know what to say, that we have two kinds of rabbis. It is not allowed to call a person rabbi unless he is ordained and that is what I say. This is the curse in your country. It is only in America. In Europe, it couldn't happen there.

Q. Let me ask you this. Is there a ritual that a person has to go through to become an ordained rabbi?—A. A ritual?

23 Q. Yes; that a person has to go through in order to become an ordained rabbi?—A. Positively.

Q. Could you tell me what ritual he has to go through?—A. Well, we have, like I mentioned before, a Shulchan Oruch. There is four kind of books which deals with all works of life. For instance, we have one book concerning the divorces, marriages, which this book we call Eben H'ezer. It is known as this book. It deals with these problems. We have books of Chosen Mispat. It deals just about things that concern business; money matters. And we have a Yoreh Eah. It consists of what is kosher, what we are allowed to do, what we are not allowed to do. We have another book, which is Orach Chaim, regular routine of life; for instance, how to write, you know, how to conduct a funeral, how to make a blessing on wine and bread, how to observe the Sabbath. So to go through as a rabbi you must at least know a good part of these books, the code of law, what we call.

Q. Let me ask you this question and I will be through with you. Is it not possible for a person who wants to be familiar with the Talmud and the laws of Judaism to go to the Mesifta Seminary without intending to be an ordained rabbi? Do you understand my question, Rabbi?—A. I understand that question, but it is very hard for me to answer this question. I will tell you why, because, for instance, when we are—for instance, I was a

24 student. When I was a student I didn't think of a career. When I was a student I only have in my mind to sit and study. I didn't think about a career, like here in a college a person is going to take up something. Many people are learning. They are not even thinking of a career. They want to know, until they are completed, to think about a career. So a person can be in the school and he might not think what he will be. He might not think at all about this question. So this is a matter that concerns a person's feelings.

Q. I understand. Let me ask you this, and I ask you this because I believe it is important to a fair determination in this case.—A. All right.

Q. Is there any pledge or any oath required from any student matriculating in the Mesifta Seminary?—A. Matriculating? What is this word?

Q. Registering; taking up a course in the Mesifta Seminary; required of any person indicating his intention that he is pursuing the studies for the purpose of becoming an ordained rabbi?

Mr. Eichler. Now, wait a minute, Rabbi. The only reason I am filing an objection to that question, if your Honor please, is that we have the dean or registrar of the Mesifta Talmudical

Seminary here, who I believe is the only man competent to answer that. Rabbi Weller is not attached to that seminary.

25 The COURT. Well, if he can't answer the question, if he doesn't know definitely, then he should say he can't answer it, and if he can answer it, of course he may proceed.

Mr. EICHLER. Well, I have no objection. Of course, we have the competent testimony.

A. I don't know the procedure.

The COURT. He says he doesn't know. There is another man here who is qualified to answer that question. He says he can't answer it.

Q. Rabbi Weller, could you tell me this? Has any rabbinical school anywheres, whether in the United States or any other part of the world, ever excluded as a student in their seminary a person who had no desire to study the Talmud or the rabbinical laws for the purpose of becoming an ordained rabbi? Can you answer that question?—A. Make me clear. For instance, if the institution feels that the student don't want to be a rabbi, they expel him for it? Is that your question?

Q. No. Whether they take him in to study.—A. Will they take him in to study?

Q. Yes. Suppose, let me put it on a practical basis. Suppose I were of the Jewish faith and I should go to any rabbinical seminary and state to the persons in charge of this seminary

26 that I want to pursue this course of study for the purpose of acquainting myself with the rabbinical laws and the Talmud, for purposes of enlightenment but not for purposes of becoming an ordained rabbi. Would I be permitted to pursue those studies.—A. You would be permitted, but I don't think they would bother with you to learn to you the code of the law.

Q. I would be permitted to study?—A. To study the Talmud; yes.

Mr. STANZIALE. No further questions.

Mr. KREEGER. That is all.

SAMUEL QUINN, called and affirmed on behalf of the petitioner, testified as follows:

Direct examination by Mr. KREEGER:

Q. Rabbi Quinn, are you associated with Mesifta Talmudical Seminary?—A. Yes, sir; I am.

Q. In what capacity?—A. I am the registrar and the assistant to the Dean.

Q. How long have you been so associated with the Mesifta Talmudical Seminary?—A. Since 1935.

Q. Do you know the petitioner, Jacob Saimuels?—A. Yes, I do.

Q. How long have you known him?—A. I have known
27 him at least twelve years.

Q. Do you have with you his school record at the Mesifta Talmudical Seminary?—A. No, I don't.

Q. Do you know his record?—A. Certain parts of the record I do know.

Q. Was he an enrolled student at the Mesifta Talmudical Seminary?—A. He was.

Q. Between what years?—A. Between September 1933 and up to the time of his induction into the Army, which was quite recent, with the exception of a period of approximately two years when he was out of the school. That period was approximately between the end of 1939 and sometime in 1941, I guess.

Q. Do you remember if that was September 1941?—A. Well, I couldn't say accurately. I believe the record shows it.

Q. You mean the record of the local board?—A. The record of the local board; yes.

Mr. STANZIALE. Are you using the record?

Mr. KREEGER. Well, I may have to take out certain records.

Mr. STANZIALE. Very well. Then I will look at it afterwards. Go ahead. You use it.

Q. And is Jacob Samuels still carried on the records of the school?—A. Yes, he is. He is on leave in the United States Army.

28 Q. And according to the records of your school and the record of standing of the student, when was it expected that Jacobs Samuels would be ordained?—A. Well, in rather a relatively short period.

Q. How long?—A. Approximately about a half a year.

Q. Would you say that in June or July 1945?—A. Approximately.

Q. Rabbi Quinn, I show you a letter of August 20, 1942 and ask you whether that is your signature.—A. Yes, it is.

Q. I also show you a letter dated October 19, 1944 and ask you whether that bears your signature?—A. Yes, sir.

Q. Will you please explain to the Court the facts and circumstances concerning those two letters that were sent to the local board?—A. The first letter reads—the first letter is addressed to Local Board No. 193 regarding Jacob Samuels, whose order number 11,279, and it reads as follows: "Dear Sirs: Kindly be informed that the above named registrant is a day student in our seminary and attends classes thirty-four hours a week. He entered our rabbinical division in September 1937 and will probably graduate in 1945."

Singed, "Rabbi Samuel Quinn, assistant to the dean."

Now, there is a postscript to it, which is also signed by me. The

postscript reads as follows: "Mr. Samuels has been attending our school system since the age of six. He graduated from our
29 eight-year elementary course and from our four-year pre-rabbinical course. Upon his completion of the latter division he was admitted to our rabbinical division in September 1937. After having attended for two years he left the school in June 1939 to seek employment. In September 1941 he returned to our evening division, and in July 1942 he was transferred to the day session." Signed by Samuel Quinn.

Q. What is the date of that letter?—A. The date of that letter is August 20, 1942.

Q. Shortly after August 20, 1942, was the matter of that letter called to your attention, particularly with reference to the phrase, "to seek employment"?—A. Well, I don't know whether it was shortly after, but sometime after writing that letter it was called to my attention.

Q. Did you check into the records to see whether that was correct?—A. Yes, I did.

Q. What did you find, Rabbi Quinn?—A. I found that the student was not well for quite a while previous to his leaving the school in 1939, and not only was the student examined by his own private doctor, under whose care he was for a long time, but he was also sent by the school proper to a specialist in order to be examined and his condition to be——

Q. Diagnosed?—A. Diagnosed, and he left the school, not in order to seek employment, but he left the school because the doctor advised him to stop studying for the sake of his health. It
30 was only at a subsequent time that it was the doctor's advice that he should indulge in some physical form of occupapation, and that is why, that was the primary reason why he undertook to work.

Q. Is that how you got the idea that he had left to seek employment, because actually he did some work afterwards?—A. Actually he did some work.

Mr. STANZIALE. I object to that. I think that question is very leading, very leading now. I have not objected to the previous testimony, which is hearsay, what he has stated before.

The COURT. Since he has given all of that hearsay, I will permit him to answer this question.

Mr. STANZIALE. All right, Judge Rice.

Mr. KREEGER. There is no jury here.

The COURT. It is before the Court anyway.

Mr. KREEGER. It is part of the record, your Honor, which will eventually be offered.

The COURT. It is what?

Mr. KREEGER. I say, it is part of the record which will eventually be offered. Anyway, these letters were.

(The last question is read.)

A. Yes. I personally knew of the fact that he was working and I had thought that it was the doctor's first recommendation that he go to work rather than to stop all occupation
31 whatsoever, but it was later affirmed that the doctor's first advice for him was to stop everything, have complete rest, not only physical but also mental.

Q. I call your attention to the further letter to the local board and ask you the circumstances as to how that came to be written.—A. Well, the registrant evidently was called before the local board, and when he closely examined his file he found that there was an inaccuracy in my letter as to two respects; first, that he did not leave the school in June 1939, and the second one was the matter, of course, of his leaving the school, which I alleged was to seek employment; and calling that to my attention, I further investigated. I asked the instructors under whom the student studied. As is customary in our school, the student and instructors are rather intimate, and the students confide to their instructors all problems which concern them, not only regarding their career and studies but also personal matters as well, and I found that the student—First of all I found on the record that the student left in October 1939.

Q. How did you come to say in the earlier letter that he left in June 1939?—A. Well, the period, when I stated that he left in June 1939, since that is the end of the year, 1938–1939 academic year, which the student actually completed, whereas the beginning of the 1939–1940 *aca*demic year, which he had only begun
32 but did not even complet' halfway. He was not credited for that year but actually the student did attend until October 1939.

Q. Did you make any further correction in your letter of 1944?—A. I made the second correction regarding the matter of employment, and I state in the letter that his leave in 1939 was taken because of poor health and not to seek employment, as I stated. The error arose from the fact that three years later in August 1942 when I wrote the letter during the summer vacation, the school authorities to whom he had spoken were not available, and I assumed that he left to seek employment because I had heard that he was employed in 1941 and part of 1942, when he was attending our evening session. However, I have since spoken to Rabbi Rivkin, who acted as the registrant's faculty adviser in 1939, and he tells me that the application for leave was on the ground of ill health and not to seek employment.

Mr. KREEGER. Your Honor, I offer the letter of August 20, 1942,

from the Mesifta Talmudical Seminary to Local Board 193 as relator's exhibit.

Mr. STANZIALE. If your Honor please, those exhibits are already in evidence. They have been made a part of my return.

The COURT. They constitute a portion of the response here, and I take it that all parts of the file are in evidence. You may
33 formally offer any part of it that you want to.

Mr. KREEGER. We should like to offer these. We may have an objection to a certain part of the file, your Honor, although it is part of the local board record, and with your Honor's consent I would like to offer these separately, if you have no objection.

The COURT. They will be admitted.

(The letters referred to are marked "Exhibits P-1 and P-2.")

Mr. STANZIALE. May I, for the sake of keeping the file in order, request the Court that those particular exhibits be kept with the selective service file?

The COURT. Yes. They are also part of the government's exhibit, but they have been selected and offered separately by the defendant. It is allegedly shown that they are a part of the government's file and a part of the government's exhibit in the case.

Mr. KREEGER. Of course on the record the government has not offered the exhibit yet. I suppose Mr. Stanziale will do that.

Mr. STANZIALE. It has been offered with my return. It becomes a part of the record.

The COURT. I find that attorney generals do not agree on whether an exhibit is in evidence or not, but I so consider it.
34 When the attorney files an answer and the exhibits are attached to it and he makes it part of the evidence, I consider that in evidence myself.

Q. Now, Rabbi Quinn, I understand from you that the relator attended the parochial school, Yeshivah Torah Vodaath; is that correct?—A. Yes.

Q. And did I hear you state that he completed that in 1933?—A. Yes.

Q. Did he enter the prerabbinical course given by the Mesifta Talmudical Seminary?—A. Yes. The entire course, both what is called prerabbinical and rabbinical, is one integrated course. It is not something preparatory in the sense that it is a subject different from what is studied in the rabbinical course, but it is actually the same subject matter and taken up, of course, in a more——

Q. Elementary way?—A. Elementary manner.

Q. And did the relator, Jacob Samuels, complete the prerabbinical course?—A. Yes, he did.

Q. And was that in 1937?—A. Yes.

Q. And did he enter the rabbinical course in 1937?—A. Yes, he did.

Q. Did he continue at that course until October 1939?—A. Yes, sir.

Q. When he left in accordance with the explanation in these letters?—A. Yes.

35 Q. And when he returned in 1941, did he return to the rabbinical department?—A. Yes, he did; but to the evening session.

Q. But that was a part of the rabbinical school?—A. Yes, sir.

Q. Did he return to the day session at any time?—A. Yes, he did.

Q. When?—A. It is given in the letter.

Q. It is given in the letter as in July 1942. Do you want to see the letter to refresh your recollection?—A. Yes, please. In July 1942.

Q. And from July 1942 down to the date of induction in December 1944, did Samuels continue as a full time student?—A. Yes, he did.

Q. Did you during those years that we have referred to from 1937 on have occasion to talk to Samuels as a student of the Mesifta Talmudical Seminary?—A. Yes.

Q. And did he discuss with you his personal problems and aims and aspirations?—Yes, he did.

Q. And did he have any talk with you as to what his aim in life was?—A. Yes. He told me that his purpose in attending the Mesifta was in order that he should be ordained and practice the rabbinate.

Q. Was that a single conversation?—A. No.

Q. Or did you have a number of conversations with him over the years?—A. Several.

36 Q. Does the relator live in the vicinity of the rabbinical seminary?—A. Yes.

Q. Would you say a short walking distance?—A. Yes. About ten minutes walk from the building.

Q. After 1937, when he entered the higher rabbinical department, about how much time did he spend per day in the rabbinical seminary?—A. The full time session is from nine to five-thirty that every student is required to attend.

Q. And at that time was it part of your function as registrar to see the students frequently?—A. Yes; rather frequently.

Q. Would it be possible for a student to attend at his classes and for you not to see him, say, once a week?—A. No. I would see him almost every day. I wouldn't interview him every day, but I would see him because it is part of my function to enter the

classroom daily, or almost daily, for purposes of checking up on the attendance and sometimes for other reasons, as the occasion may arise.

Q. And in the course of those years can you give us any idea as to how frequent your personal interviews with Samuels were, going back to 1937?—A. I wouldn't recall how often we had formal interviews, but I saw the student, as I said before, almost daily, and I would speak to him very often. I mean, I would see him not only during school days but also on Saturdays
37 when there were no classes, and we would meet in the synagogue, in the study room, and of course there were always informal discussions between students and whichever members of the faculty are available as far as subject matter is concerned and other problems.

Q. As a student who lived in the immediate vicinity of the seminary, did you have a better opportunity to know about his aims and aspirations than perhaps about one who lived farther away.—A. Certainly. I would add to that answer that a student living in the immediate vicinity of the school could be observed more closely and I could be convinced more about his intentions more so than for a student who lives at a distance and whom I only meet, so to speak, on a business basis, studies, and examinations, records,—

Q. Now, you have stated heretofore that he was to be ordained in the summer of 1945, either June or July, and you so wrote in your letter of August 20, 1942, marked "Exhibit P-1." Can you tell us what subject the relator still had to complete for his ordination; what subject or subjects?—A. The codes.

Q. And what book is that? What name does that go by?—A. Yoreh Deah.

Q. Was Samuels studying that code at the time of his induction?—A. I guess he was. I say I guess because I don't
38 have supervision. I mean, as far as the studies are concerned, I don't supervise the senior students. I supervise the studies of junior students, and I could say definitely exactly how much the student has covered during a certain period and what he has studies, and so on and so forth, but I have no such knowledge of the senior students. All I know is that at the end of the year the instructor gives me the completed work, the work that is completed by each individual student, which I make a record of.

Q. But you do know this much, that the only subject remaining for Samuels to study before standing for ordination was this book, the Yoreh Deah; correct?—A. Yes.

Mr. KREEGER. That is all. Your witness.

Cross-examination by Mr. STANZIALE:

Q. Rabbi Quinn, how many students have you in the Mesifta Seminary?—A. In the entire system we have today approximately five hundred.

Q. How many senior students have you there at the present time?—A. In the senior division we had on the beginning of the semester 269.

Q. At what age can they enter your seminary?—A. A student at the first time he enters the seminary is on the average of fourteen years old. He enters our seminary when he completes
39 the eight-year course in our elementary division, which is known as Yeshivah Torah Vodaath. A student completing that school does not automatically enter our seminary. He first has to pass an entrance examination, and when he is found qualified he is admitted to the seminary. No further questions are asked as to his purpose, and so on and so forth. He enters the seminary as a student, because when a student is fourteen years old we consider him immature to know exactly what he plans to do and what his aim is, and so on and so forth. A student continues for several years, ranging on his ability. The average student completes what we call the prerabbinical course in three years; the duller student completes it in a period of four years; and at that time he enters what is known as the Beth Hamedrash. A student is on the average of the age of seventeen when he enters that division if he goes along smoothly.

Q. Then I take it that there is ordinarly a three-year prerabbinical course for continuing of studies to become an ordained rabbi?—A. Yes; but I want to make that clear, that it is not a pretheological course as it is understood in the general sense; pretheological. Pretheological in colleges is a secular course in languages and social studies and other subject matter. It is preparatory to a student studying theology; whereas here the student actually studies theological subjects. It is only that it is on a more elementary level.

40 Q. Then how long is the course for the continuance of studies to become an ordained rabbi?—A. On the average of six years.

Q. Now, when a person enters your seminary, let's say at the age of fourteen, is it a condition precedent or is any oath or affirmation required either of the student or his parents or natural guardians that he is entering your seminary for the express purpose of becoming an ordained rabbi?—A. No; there is not. It is merely that we know our purpose but we don't make any such condition.

Q. You have answered my question, Rabbi Quinn. Now, at the conclusion of the three-year prerabbinical course for purposes of

ordination and the continuance to become an ordained rabbi, is there required an oath for affirmation, either by the student or his parents or his natural guardian, that he intends to continue the course for the purpose of becoming an ordained rabbi?—A. Well, I will have to set a borderline to that; to the answer.

Q. My question was this——A. I understand the question very clearly, but I want to tell you what I mean. Up until the time that we had a government obligation we did not inquire into the motives of the students' attendance, but after the draft law was passed and the draft law contained a provision that students attending a recognized theological school with the purpose of
41 becoming ministers of religion should be exempt from draft, from that time on we made it a point that we do not admit a student into that senior division unless he expressly states his desire that he wants to become a rabbi.

Q. Then I understood you to say that Mr. Samuels began his studies, or the advanced studies, let's call it, in 1937?—A. Yes.

Q. So that at the time that Mr. Samuels began these advanced studies there was not required of him, nor was it made a condition precedent by your institution to continue his studies, that he was doing so for the express purpose of becoming an ordained rabbi; is that correct?—A. That is correct.

Q. Very well. Now, you have mentioned, I believe, during your direct examination, about certain records. Do you have those records with you, Rabbi Quinn?—A. No.

Q. Were you asked to bring them?—A. No; I was not asked to bring them.

Q. I understand. All right. Now, Rabbi Quinn, I am particularly interested in the letter dated August 20, 1942, that particular part which is referred to as the postcriptum, in which you say that Mr. Samuels has been attending your school system since the age of six, that he graduated your eight-year elementary course and from your four-year prerabbinical course, as you have
42 already related on my cross-examination, and you further state that he entered the latter division in September 1939.—A. In September 1937.

Q. Or 1937. I am sorry, sir. And that he then left for two years in June 1939 to seek employment, and in September 1941 he returned to your evening division, and in July 1942 was transferred to your day division. Could you tell me if at the time that you sent this letter to the draft board you referred to any records?—A. I suppose I did because I wouldn't write the letter from memory. I surely did.

Q. Can you tell us to the best of your recollection, Rabbi Quinn, if before coming to court you referred to the record from which you received the information wherein you wrote the letter the contents of which I have just read to you?—A. Yes, I did.

Q. And does your record contain the same information that is contained in the letter?—A. No; it does not.

Q. It does not?—A. It does not.

Q. Now, on October 19, 1944 you wrote a letter to the draft board again?—A. Excuse me. I want to explain what I mean, it does not. It does not contain that he left the school in June 1939, but it does contain that he was credited with his work.

Q. I understand that. Where did you get that information from if the record does not contain that, Rabbi Quinn?—A.
43 The record does contain that he was credited with his——

Q. No; not that, Rabbi Quinn. In reference that he left the school in June 1939 to seek employment.—A. To seek employment?

Q. Yes.—A. Well, seeking employment was from my own knowledge. It is not shown anywheres. Our record card does not provide any space for the reason or the occupation of the student after he is dismissed from the school.

Q. Well, he was not dismissed from the school, was he?—A. Well, that is also a thing which we have only one section for, the time that a student ceases to attend. We mark down that date.

Q. What does your record show as to why the student in this particular case left in June 1939?—A. It shows no reason at all.

Q. Where did you get the information from?—A. From my own knowledge.

Q. From your own knowledge. I see.—A. Yes. I have known the student personally.

Q. I understand that. Now, you then state in your letter of October 19, 1944, approximately two years after, that there was an error in the letter that you sent on August 20, 1942. Now, where did you get the information to bring it to your attention that you had committed an error in your letter of August 20,
44 1942, so as to correct it in your letter of October 1944?—A. The date is on the card. The date of leaving is on the card. As to his reason for leaving, he had Rabbi Rivkin—rather, I spoke to Rabbi Rivkin and I also saw the letters from the doctor under whose care the student was at that time.

Q. So that the contents of your letter of October 19, 1944 are not based on any personal knowledge that you have but on information that you received from Rabbi Rivkin and on information that you received from the attending physician, is that correct?—A. No.

Q. Is it not?—A. Not entirely.

Q. Would you correct me then?—A. Yes. I know that the student was unwell in 1939. As a matter of fact, as I said before, the school had sent him to its own doctor for physical examination and I personally accompanied the student to that doctor at the time he was examined. So I knew that the student was not well, but it

was my impression that his doctor at that time had advised him to engage himself in some physical occupation, and that is why I put down that he went out to seek employment, but later I was corrected on that. The doctor's first advice had been that he do nothing at all, neither study nor work, but to take complete rest. It was only at a subsequent date that the doctor recommended for him to work.

Q. So that, Rabbi Quinn, you had that information at the time you wrote the letter of August 20, 1942?—A. Yes; but
45 I had thought that the doctor's advice was that he go to work immediately.

Q. And then of course two years later you remembered that you had——A. No; I did not remember. Two years later I found out that the doctor did not advise him to go to work.

Q. Did you know, Rabbi Quinn, that in 1940 this young man worked as a shipping clerk?—A. Yes.

Q. That was against the doctor's orders, was it not, from what you understood?—A. I understood that those were the orders of the doctor. That is why, because I knew. As a matter of fact I once entered the place where he worked and saw him working there.

Q. Did you know, Rabbi Quinn, that he worked in 1940, he worked in 1941, worked all of 1941, and that in 1942 he worked during the day and then started his studies in the evening?—A. I wouldn't——

Q. You don't know that?—A. No.

Q. You can't tell us, Rabbi Quinn, whether at the time this relator left your institution in June of 1939 or September—it makes no difference; only two months—whether he at that time gave you the information or stated to you that he was discontinuing his studies in order to pursue an occupation?—A. Well, frankly I don't recall that the student spoke to me personally
46 to tell me that he left. I know that he spoke to my superior, Rabbi Mendlovitz, and I mean as far as I could recall at this time, the information that I received was from Rabbi Mendlovitz that he is discontinuing study. I know the student had discontinued. I know that he was not attending, but that he had actually discontinued his studies, that information I received from Rabbi Mendlovitz, who was the dean of the school at that time, and not from him direct.

Q. You see what we are concerned with in this particular case is whether he pursued his studies again in 1942, when the draft law had gone into effect. That is what we are concerned with in this particular case. There is one more thing. Going back to the students who have come into your school, has any student been

denied admission to the Mesifta Seminary who has stated that he was pursuing a course of studies for the purpose of enlightenment and not for the purpose of becoming an ordained rabbi?—A. Since the draft law has been enacted——

Q. No, no. Before.—A. Before the draft law has been enacted?

Q. Before October 1940, when the draft law went into effect.—A. No.

Q. Have any students been excluded or denied admission to your seminary if they have stated that they did not intend to become a practicing rabbi?—A. Yes, sir.

Q. Who? Do you know of any names?—A. Yes. I
47 could mention some offhand.

Q. I mean, would it be too much trouble?—A. No. I could mention some.

Q. Who?—A. Binyamin Labovitz.

Q. Can you tell us approximately when?—A. About a year ago.

Q. Was that determined upon the fact that they were not scholastically qualified?—A. No. He was rather a good student; an excellent student. He made very rapid progress, but he told the dean that he did not intend to become a rabbi and the dean told him, "Then it is your duty to notify the draft board," and the dean instructed me to correspond with the draft board, which I did.

Q. Under these circumstances of course no action would have been taken here before the draft laws went into effect?—A. No.

Mr. STANZIALE. I don't think I have any more questions to ask Rabbi Quinn with the exception of one one that point.

Q. Rabbi Quinn, you appeared, did you not, with the relator in this case before the draft board?—A. Yes.

Q. Before he was inducted in the United States army; is that correct?—A. Yes.

Q. And you have given substantially the same testimony?—A. Yes.

48 Q. As you have been giving here today?—A. Yes.

Q. And these facts were developed before the draft board; is that correct?—A. Yes.

Q. And after your appearance before the draft board and after their consideration of what you have given, a notice of induction was sent to the relator to report for induction, which I believe was——

Mr. EICHLER. Just a minute. I object to that as asking the witness for a conclusion, because if your Honor will recall, the question involves after the draft board gave consideration to what you said, that the draft board did such and such a thing. We object to that on the ground that it calls for a conclusion on the part of this witness. We don't dispute the record, or, rather, the witness testifies that, "I appeared before the draft board and substantially

gave the testimony that I have given today," period, and that is the end of it, and I object to anything else.

The COURT. Well, I don't want him to say that the draft board gave consideration to the testimony.

Mr. EICHLER. That is right, sir.

The COURT. I wouldn't consider that he could tell me that even though it is included in the question, but in order to eliminate that possibility, just confine it. Was it after you appeared
49 before the draft board that the order for induction was made, and if so, how long after?

Mr. STANZIALE. That is just what I had in mind, Judge Rice.

The WITNESS. Well, Your Honor, I really don't know whether the order of induction was mailed before I had appeared before the draft board or after I had appeared.

The COURT. How long after you appeared before the draft board was it that you learned that the boy had gone into the army?

Mr. STANZIALE. Your best recollection.

The COURT. You don't have to be exact, but was it weeks or months, or days?

The WITNESS. I think it was a matter of days.

Mr. EICHLER. Will this help? As I understand it, the boy was inducted on the 20th of December or around that time.

Mr. STANZIALE. The 26th.

Mr. EICHLER. The 26th. Rather, the order was issued apparently the 20th. Can you with relation to the 26th of December 1944 give the Court some idea as to when you appeared before the draft board?

The COURT. Doesn't the record show when he appeared?

Mr. STANZIALE. Yes; it does.

The COURT. Is that all?

Mr. STANZIALE. That is all, Judge Rice.

50 Redirect examination by Mr. KREEGER:

Q. Just one point, Rabbi Quinn. Samuels did return to the Seminary in July 1941?—A. Yes.

Q. And that was to the rabbinical seminary?—A. Yes.

Q. Not to the prerabbinical course?

The COURT. Was that 1941 or 1942?

The WITNESS. 1941. He came back to the evening session in 1941 and entered the full-time day session in 1942.

The COURT. Well, on that point, when does your scholastic year begin and end? Do you stay in session all the year?

The WITNESS. We are in session all the year. We are in session all year, your Honor.

The COURT. You don't have nine months' study and three months' vacation?

The WITNESS. No. We used to have a vacation, but the selective service from Washington gave us an order to be in session with no vacation at all; no summer vacation anyway.

The COURT. The Court will now recess until two o'clock.

(At twelve-fifteen o'clock P. M. a recess is taken until two o'clock P. M.)

51 AFTER RECESS

Mr. EICHLER. If your Honor please, during the recess hour we attempted to contact a Doctor Hertz, a practicing physician of New York City. He was the attending physician to this boy and he directed him to discontinue his studies in 1939. My colleague here, Mr. Kreeger, was able to reach the doctor on the telephone and you know doctors are very busy nowadays. With so many of them in the military service, very few are left for private civilian practice. At any rate, we received assurance from the doctor that he would arrive here by between three and three-fifteen. Now, we are confident that we will take up that time with other witnesses.

The COURT. I will wait for him.

Mr. EICHLER. Thank you.

MOSHE B. RIVKIN, called and affirmed on behalf of the petitioner, testified as follows:

Mr. KREEGER. I believe Rabbi Rivkin has not a full command of the English language and I may have to be a little slow or patient with him.

The COURT. All right.

52 Mr. KREEGER. With your Honor's permission.

Direct examination by Mr. KREEGER:

Q. Rabbi Rivkin, are you a teacher at the Mesifta Talmudical Seminary?—A. Yes.

Q. Were you a teacher at that seminary between 1937 and 1940?—A. Yes.

Q. And since that time have you continued to be there, a teacher down to this day? Are you still a teacher there today?—A. Yes.

Q. Do you teach Talmud?—A. Yes.

Q. At the seminary?—A. Yes.

Q. Do you know Jacob Samuels?—A. Yes.

Q. Was he a student of yours in the seminary?—A. Yes.

Q. And was he a student in your class between the years 1937 and 1939?—A. Yes.

Q. Did he have a conversation with you in 1939 about leaving the school for a time?—A. Yes.

Q. Can you tell us what he said to you as to why he was leaving?—A. Yes. Aug Yiddish?

Mr. KREEGER. We have no interpreter here.

The COURT. Can you interpret?

Mr. KREEGER. Oh, yes, sure; if your Honor will permit me to.

Mr. STANZIALE. I have no objections.

53 The COURT. You let him answer in Yiddish and you translate.

Mr. KREEGER. And I will translate.

The COURT. All right.

(From this point on the testimony of this witness is taken through Mr. Kreeger acting as interpreter.)

A. He told me towards the end of 1939 that he wasn't feeling well, and I had noticed before in the course of his studies that he wasn't feeling well, and I told him that he should go to a doctor. He told me that he did go to a doctor and the doctor advised him to leave off studying for a short time.

Q. And did he leave the school at that time?—A. Yes.

Q. Before he left the school was he in the Beth Madrash?—A. He was being admitted to the Beth Madrash in 1939.

Mr. STANZIALE. I understand that he said the end of 1939.

Mr. KREEGER. That is what I said; that he was to be admitted the end of 1939.

(The last answer is read.)

Mr. KREEGER. At the end of 1939, he said. I wouldn't dare mistranslate, your Honor, because there is quite an expert in Yiddish sitting at the table here.

Mr. STANZIALE. You don't mean me.

54 Mr. KREEGER. No, no. Right alongside of you.

Mr. EICHLER. Why doesn't he act as interpreter then?

Mr. STANZIALE. No, no. That is all right.

The COURT. No question about it. Either answer would have been about the same; except the way it was finally given was more specific than the other.

Mr. EICHLER. I suggest, your Honor, that Rabbi Quinn interpret. I think it is too much of a load for counsel to ask questions and then try to interpret the witness's answers.

The COURT. I don't think anybody is objecting to his doing it, but you may make the change if you want to.

Mr. STANZIALE. I have no objections as to who is called. I would like to be agreeable in every way possible.

Mr. EICHLER. Go ahead.

Q. For the year or two before he left in 1939, about how many hours a day did he devote to studying rabbinic subjects?—A. Before 1939?

Q. Yes. Before he left in 1939, about how many hours a day did he devote to studying rabbinic subjects?—A. The whole day.

55 Q. What subjects was he mainly studying?—A. The main subject, Talmud and Shulchan Oruch.

Q. Did he study Talmud at that time with the various commentaries?—A. Yes.

Q. For how many years had he been studying the Talmud intensively before 1939?—A. He learned with me for two years and before that he learned it in the other classes.

Q. Is the study of Talmud in its advance courses a study that will take all of a man's mind and attention?—A. Surely.

Q. Does it happen sometimes that a student who is devoting himself to advanced courses in rabbinics and Talmud suffers physically as a result?

Mr. STANZIALE. That is objected to, Judge Rice.

The COURT. I don't see where that would make any difference. He said it takes intense study.

Mr. KREEGER. Very well, your Honor, I withdraw the question then.

Q. When this student, Jacob Samuels, was in your class in 1937, 1938, and 1939, how many hours a day did he devote to the study of Talmud?—A. It means from nine in the morning to five or six in the afternoon.

Q. Did he devote any evening hours, to your knowledge, to the study of Talmud and rabbinics at that time?—A. I do not know definitely, but I think so.

Mr. KREEGER. Your witness.

56 Mr. STANZIALE. Do you mind interpreting for me?

Mr. KREEGER. Yes, surely. I will be delighted to. Just one more question.

Q. In 1941, when Samuels returned to the school, you were no longer his teacher?—A. No.

Mr. KREEGER. I am ready to render my services.

Cross-examination by Mr. STANZIALE:

Q. Rabbi, is it not a fact that the courses at the Mesifta Seminary are not restricted to students who specifically plan to become practicing rabbis?—A. That is not so. Especially at this Mesifta a boy who enters, it is for the purpose of becoming a rabbi. A student of the parochial elementary school, the Yeshivah, who does not have any intention of becoming a rabbi and studying for the rabbinate, goes to other places and does not go to the Mesifta Talmudical Seminary. Especially in that age from seventeen, eighteen, a boy, and the more so in cases of boys who are seventeen or eighteen years of age, if they stay on at the Mesifta Talmudical

Seminary, they stay on for the reason that they intend to make the rabbinate their profession. They study for the rabbinate. Otherwise they go away.

Mr. STANZIALE. Will you tell the rabbi that my question specifically is directed to this particular point? I don't think his
57 answer is responsive, in that my question was whether any of the courses are restricted to students who are specifically planning to become practicing rabbis. That is my question. Are the courses restricted to those people, or can other persons come in and take the courses?

Mr. KREEGER. Now, you will have to be easy with me. I will ask one question at a time.

The WITNESS. In the Mesifta there are to be found only students, and if he is studying there it means for the rabbinate.

Mr. KREEGER. I think I can clarify it for you in a minute.

The district attorney did not ask you that. Are the courses at Mesifta limited to be given only to students who wish to become rabbis, or can any students take the courses? I believe that is the intent of the question.

Mr. STANZIALE. That is the question.

The WITNESS. It is theoretically possible, but practically it cannot be done, but all students studying at the Mesifta are studying for the rabbinate, because for ordinary Jewish education he has enough up to Mesifta and then he leaves if he is only interested in general education.

Q. That is not my question. My question is at this
58 particular time were the courses restricted only to those persons seeking ordination as a rabbi?

The COURT. What do you mean by "This particular time"?

Mr. STANZIALE. At the particular time before October 1940.

Mr. KREEGER. Before October 1940.

Mr. STANZIALE. Yes.

Mr. KREEGER. Your Honor, we already have that in the testimony. The registrar testified that before 1940 they were not restricted. It is only since the selective service came in. That is in the record. That is already in the record. The registrar testified to that.

Mr. STANZIALE. All right.

Q. Now, I take it that a student would not be excluded who desired to study the Talmud not for the purpose of becoming an ordained rabbi?

Mr. KREEGER. You mean now?

Mr. STANZIALE. Yes.

A. I do not know. That is a problem for the management of the institution.

Q. But it was definite that a student would not be excluded before October of 1940 to study the Talmud?

Mr. KREEGER. Your Honor, I submit on that question
59 that he has asked it before in another form. The registrar has already testified, and this man, who is not a teacher, would not be the man to testify to that.

The COURT. They seem to want him to.

Mr. KREEGER. All right. Will you read the question for me?

(The last question is read.)

Mr. KREEGER. If he was not studying for the rabbinate. Is that the end of your question?

A. I think so. It is possible. Possibly so.

Mr. KREEGER. The witness would like to add something, your Honor.

A. (Continuing:) Factually for the information of the district attorney in response to his question, boys above the age of seventeen who are studying at the Beth Madrash all have the intention of becoming rabbis. Otherwise they either leave when they complete the elementary parochial school at the age of thirteen or fourteen or when they reach the age of seventeen, because by then they have obtained enough education.

Q. That still doesn't answer my question. I want to know if a person wants to study the Torah Lishma, whether he would excluded or restricted?

Mr. KREEGER. You mean without aiming for the rabbinate?

60 Mr. STANZIALE. That is right.

A. I cannot say definitely, but I think the answer is no. In addition to that, I don't think anybody now appears or at any time has appeared who walked in and said that he merely wanted to study the Torah Lishma.

Q. But if somebody walked in and wanted to study the Torah Lishma, he wouldn't be excluded or restricted before October 1940?

Mr. KREEGER. I object to that, your Honor. The witness has just said that there has been no such case and this would be theoretical; suppose a man did appear.

Mr. STANZIALE. He gave a theoretical answer before, your Honor.

The COURT. I would like to know his answer.

Mr. KREEGER. Yes; surely.

The COURT. Let him answer.

A. At that time possibly yes. I do not know.

Q. All right. You have answered my question now. In 1939 I believe you testified that the relator became ill and discontinued his studies. Would you tell us, Mr. Witness, whether the relator told you at that particular time that he was going to seek employment?—A. My testimony was not as the district attorney

said. My testimony was that he said that the doctor had told him that he was sick and that he should take a rest or a leave,
61 and that he wasn't feeling well and that I had noticed that because he had been nervous before.

Q. Can you tell us, Rabbi Rivkin, whether the rest was in the nature of complete rest in the absence of any physical exertion?—A. I understood that it meant a full rest and that he was to do nothing.

Q. Now, do you know, Mr. Witness, that in January of 1940 the relator was employed as a shipping clerk for the full year of 1940 up to and including the year of 1942?—A. I do not know exactly what kind of work he did, but I know that sometime after leaving he came to see me and told me that the doctor instructed that he do some physical work.

Q. Did you know that the relator filed under the social security laws and obtained a social security number in connection with his work?

Mr. KREEGER. Instead of "relator" I am using the name "Samuels." You are referring to 1941, I take it.

A. I don't know that.

Q. Can you tell us why it was that in July of 1941 Mr. Samuels came back to evening class, and remained from the school from the time he left in June of 1939?—A. Because he wanted to continue his studies after having interrupted them in the middle.

Q. Did you ask the relator why it was necessary to remain
62 away approximately two years and two months?—A. I didn't ask him. That was not within my province.

Q. Did he ever tell you why it was necessary to remain away for a period of two years and two months?—A. He didn't have to tell me because I knew myself from the previous time that the doctor told him to take a rest and that afterwards the doctor advised him to go to work.

Q. Did either the doctor or Mr. Samuels tell you how long the doctor said he had to take a rest?

Mr. KREEGER. By rest you mean away from school?

Mr. STANZIALE. Yes.

A. No. That he never told me.

Q. Did you communicate with the doctor and ask the doctor how long it would be necessary for Mr. Samuels to remain from the school?—A. No.

Q. Did you give Mr. Samuels any suggested lessons to take at home while he was away from school during this period of time?—A. No.

Q. Did Mr. Samuels ask for any suggestive course of study while he was away from school during this period of time of two years and two months?—A. He never asked me what subjects to

study during that time, but he came in to ask me frequently questions in connection with matters that he was studying.

Mr. STANZIALE. That is all.

The COURT. I wish you would ask him one question.

63 Mr. KREEGER. Yes; surely, your Honor.

The COURT. This goes to the requirements for study. Do you require a student enrolling in the Mesifta Talmudical Seminary to make any statement concerning his intentions to be a practicing rabbi upon completion of the work, or do you assume that to be his intention by reason of the fact that he enrolls for such work?

The WITNESS. In the oral conversation that is had with the boy upon being admitted to the seminary. There is no written statement signed, but there is an oral interview, and in this oral interview the conversation is concerning his studies and whether he intends to study for the rabbinate and that the subjects all lead to the rabbinate.

Mr. KREEGER. The sum and substance of his answer—Well, I don't know if your Honor wants me to go on from this point.

The COURT. My point is this.

Mr. KREEGER. Perhaps another question might clarify it.

The COURT. Why ask him if he intends to study for the rabbinate since that is the only thing they teach in that school?

Mr. KREEGER. There is another course they teach in that school.

64 The COURT. They can get another degree in that school?

My point is this. When I enrolled in law school, they didn't ask me if I intended to practice law. They assumed that. If I enrolled there, they had a right to assume that I intended to practice law.

Mr. KREEGER. In spite of the fact, your Honor, that a man might drop out at the end of the first year?

The COURT. My question is this, and I am not questioning their faith about the matter. I am wondering if they don't have a right to assume and act upon that assumption, that anyone who asks to be enrolled in that school intends to become one.

Mr. KREEGER. That has been the testimony of the registrar and the testimony of this gentlemen. Prior to 1940, your Honor, no questions were asked as such. No statement was required, and they assumed that a man who entered was studying for the rabbinate. Because of the selective service regulations since 1940 they make it specifically a point to ask whether he is studying for the rabbinate or whether he is not, because they have to certify to the

local board. That has been the change, as I understand it from the testimony of the registrar. If your Honor wants me to——

The COURT. No. That is sufficient. It is just going over the same thing that has been gone over.

65 Mr. KREEGER. Your witness.

Mr. STANZIALE. May I ask Rabbi Rivkin to come to the stand for one minute? I think your Honor will be interested in this; or maybe Rabbi Quinn would probably be better for the purposes of this question.

SAMUEL QUINN, recalled, testifies as follows:

Cross-examination (continued) by Mr. STANZIALE:

Q. Rabbi Quinn, can you tell us whether the Mesifta Talmudical Seminary ever ordained any rabbis prior to 1942?—A. Certainly.

Q. Prior to 1942?—A. Certainly.

Q. Can you tell us when?—A. I received my ordination certificate in 1934.

Q. In 1934?—A. And there was a graduation before my group.

Q. Before your group?—A. In 1932 or 1933.

Q. Can you tell us when they started issuing certificates?—A. 1932 or 1933.

Q. Continuously each year?—A. Surely. Well, I wouldn't say—there was no definite time for graduation, but as a class qualified for ordination they were ordained.

66 Q. Who ordained you, Rabbi Quinn?—A. A group of three rabbis who were appointed by the seminary and who were not connected with the seminary in any official capacity, but who were appointed by the seminary for certain reasons in order that they should examine the students and ordain the students.

Q. Was a certificate issued to you from the Mesifta Seminary?—A. No.

Q. On the stationery of the Mesifta Seminary?—A. No.

Q. Were any of these certificates issued before 1942 to students at your seminary issued by the Mesifta Seminary?—A. No.

Q. Why?—A. Well, it was a question of policy.

Q. So that I am right in assuming then, Rabbi Quinn, that the Mesifta Seminary did not issue the certificates of ordination? Isn't that correct?—A. No. The assumption must be misleading, and I will tell you why. The Mesifta when it was organized had for its purpose to raise the level of the rabbinical ordination in this country. For certain reasons there was rather a looseness in the ordinations and people would practice as rabbis even if they were not entirely entitled to do so, by merely getting a certificate from somewheres. Even certain schools had rather low standards for ordaining rabbis. The Mesifta professed to raise

the standards for ordination, and in order to convince the
67 the public of the bona fide character of its policy, they felt that by calling in outside authorities not directly connected with the Mesifta, people who could not be swayed because of many years of contact with the students, where there are no personal affiliations that would move him to make him ordain any student even if the student were not entitled to ordination, and because of those reasons the committee system of people of authority not connected with the school was found preferable and they were called in whenever there was ordination to be performed. They examined each student individually and they are the ones that signed the certificates.

Q. When has the Mesifta Seminary begun to issue its own certificates or ordination?—A. It was the time after Rabbi Schneider was appointed.

Q. When? What year? It is since 1942, isn't it?—A. Well, let me see. Rabbi Schneider was appointed, I believe, in 1941; I believe he was appointed.

Q. Do you say in 1941 the Mesifta Seminary began to issue its own certificates of ordination?—A. Rabbi Schneider changed the policy.

Q. But prior to that time the Mesifta did not issue its own certificates?—A. No. Rabbi Schneider felt that the reputation of the Mesifta has now been established enough and the people would have enough——

Q. You have answered my question.—A. Reliance on
68 the institution itself.

Mr. STANZIALE. I have no further questions.

Redirect examination by Mr. KREEGER:

Q. Rabbi Quinn, is it not a fact that in orthodox Jewry going back for hundreds if not for thousands of years, no seminary prior to the 20th century issued ordination certificates?—A. As far as I know it is a fact.

Q. To take up just two or three examples, to your knowledge did the Rabbinic Institute of Mir in Poland ever issue its own ordination?

Mr. STANZIALE. I object, if your Honor please, for this reason. We are concerned with this case, with the policy of this institution which this relator was a member or a student of, and I think that the question should be directed to that, and I don't think we should get into thousands of years or hundreds of years ago.

The COURT. Well, I am interested in the matter of history, sir.

Mr. STANZIALE. You are, sir?

The COURT. And I would like to know the answer. I don't think it will help me in answering this question, but I would like to know it. You may answer.

A. To my knowledge it is a fact that the Mir Yeshivah did not issue its own certificates.

69 Q. Hasn't it been the orthodox policy, and I won't mention years, but since time immemorial, that after a rabbinical student or a student preparing for the rabbinate completed the necessary courses for ordination, he went to an outside rabbi outside of his seminary to stand for examination and for ordination?—A. Well, I have seen certificates signed by heads of seminaries too, but not on the stationery of the seminary. I have seen it on their own stationery.

Q. As individuals?—A. But I have also seen certificates signed by rabbis who were not connected with the particular seminary that the student completed.

Q. Now, as to the Mesifta Talmudical Seminary, in your opinion was that institution complying with the orthodox Jewish tradition?

Mr. STANZIALE. I will have to object to that because from the lips of this witness we heard that in 1941 they started to give their own certificates.

Mr. KREEGER. I have not finished my question.

The COURT. Let him finish his question, and don't answer until I have ruled out the objection.

The WITNESS. All right.

Q. Rabbi Quinn, in your opinion was Mesifta Talmudical Seminary complying with orthodox Jewish tradition between 1926 and 1941 when it had ordination certificates issued

70 by outside rabbis instead of by heads of the school?

Mr. STANZIALE. I object to that. The answer is obvious your Honor.

The COURT. I think I shall sustain the objection on two grounds. The first is that the answer is obvious, and the second is that after all we must limit this examination.

Mr. KREEGER. Very well, your Honor.

The COURT. Because we will go too far afield if we let it go too long.

Q. Since 1940 has the Mesifta Talmudical Seminary expelled any students for the reason that the authorities suspected that they were not honest rabbinical students?

Mr. STANZIALE. I object to that.

The COURT. Well, I will let him answer that.

Mr. STANZIALE. All right.

The COURT. You are asking him now for an affirmative action on the part of the school.

Mr. KREEGER. That is right.

A. I couldn't say we used suspision as a ground of expelling a student.

Q. Well then, knowledge?—A. But when we questioned the student and the student told us so. If after suspecting a certain student's point of view, then as a result of questioning the
71 student we were convinced that the student did not have bona fide intention of becoming a rabbi, then we would ask him to leave the school.

Q. Now, you testified to one case early in the day, whose name you gave.—A. Yes.

Q. Was that the only case?—A. No; it was not.

Q. Have you any idea roughly how many such cases there have been since 1940, roughly; a conservative estimate?—A. About a half dozen.

Mr. KREEGER. That is all.

Re-cross-examination by Mr. STANZIALE:

Q. Do you remember the names of the other persons?—A. I remember several names.

Q. Will you let us have them?—A. Yes, surely. One name is Robert Kranzler. Another name is Alvin Engel. Third one is Joseph Kramer.

Mr. KREEGER. And, Rabbi Quinn, those have nothing to do with students who were expelled since 1940 for not keeping up with their work?

The WITNESS. Oh, no. Those students were all students in good standing. I mean, we expelled many other students who did not reach the standards of our school, students who were even beyond, much beyond draft age. If they did not keep up with the standards of the school, they were expelled.

72 Mr. KREEGER. Since 1940——

Mr. STANZIALE. Do you realize that you have interrupted my examination?

Mr. KREEGER. Oh, I am sorry. I thought you had finished.

Q. There were a few other names you were about to give us. May we have them?—A. Oh, yes. Saul Goodstein.

Q. Anyone else that you remember?—A. Yes. Abraham Rothman.

Q. Now, these were all expelled after or subsequent to 1940?—A. Yes.

Q. None before?—A. None before.

Mr. STANZIALE. That is all.

Mr. KREEGER. One more question, your Honor.

The WITNESS. There may have been more.

Mr. STANZIALE. That is all right.

Redirect examination by Mr. KREEGER:

Q. Were any students expelled in the year 1944 of draft age for failure to keep up with their studies?—A. Yes, sir.

Q. About how many would you say, if you recall, conservatively?—A. About a score.

Q. A score; and were such students expelled in 1943 too
73 in any number?—A. Yes. Approximately about the same.

Q. And in 1942?—A. Yes.

Q. That is all.—A. I mean, this was done even prior to the draft law.

Q. But it continued after the draft law?—A. Yes; it continued after the draft law.

Q. And it continued although the students were within the draft age?—A. Yes. Of course some of those students——

Mr. KREEGER. That is all.

The COURT. Would you mind telling us of these that were expelled because you didn't think they intended to become rabbis, what their purpose was in taking up that course of study?

The WITNESS. Well, they may have had intentions of becoming rabbis up to a certain time, and then in some case the studies became too difficult. In other cases it was just a change of attitude. The student felt a certain way in his adolescence, and then when he reached maturity he felt that his calling in life was in a different vocation.

The COURT. It wasn't because they were there to avoid military service?

The WITNESS. You mean prior to that time?

The COURT. No. These particular ones the names of
74 whom you have given. Did you send them away because you thought they were studying to be rabbis in order to avoid military service? Was that the reason you did it?

The WITNESS. No, your Honor; I couldn't say that.

The COURT. That was my question. That is all. I think you had better get off the witness stand before they start in on you again.

The WITNESS. Thank you.

The COURT. Gentlemen, let's confine it a little more strictly within limits from here on.

Mr. EICHLER. If your Honor please, we only have two witnesses, the boy and the doctor that I referred to.

The COURT. Very well. Put one of them on the stand.

JACOB SAMUELS, the petitioner, called and affirmed on his own behalf, testifies as follows:

Direct examination by Mr. EICHLER:

Q. Mr. Samuels, you are the petitioner on this habeas corpus writ, are you not?—A. Yes.

Q. Where were you born?—A. I was born in Brooklyn, December 28, 1920.

Q. 1920. Have you lived in Brooklyn, New York, all
75 your life?—A. Yes.

Q. When did you first go to school? How old were you?—A. About six, I imagine.

Q. Do you recall what school you went to?—A. Yes. Yeshivah Torah Vodaath, 206 Wilson Street.

Q. You were six years of age when you went there?—A. Yes.

Q. Is that what we call a Hebrew parochial school?—A. That is right.

Q. What is the meaning of the word parochial?—A. I imagine it is used where the secular teaching and theological teachings are done at the same time but at different parts of the day.

Q. How long did you continue your studies at the Yeshivah?—A. I graduated the elementary school, both the Hebrew department and the English department, and then I entered——

Q. Now, wait. When was that?—A. In 1933. June 1933.

Q. How old were you then?—A. About thirteen; thirteen and a half.

Q. In this Yeshivah there was both a Hebrew department and an English department; is that so?—A. Yes.

Q. So the result was obtained a general course, a general
76 education both in English and in Hebrew?—A. And in Hebrew. That is right.

Q. And then at the age of thirteen you were admitted to the Mesifta Talmudical Seminary?—A. Yes, sir.

Q. And thereupon you continued to study there from 1933 until 1939?—A. 1939; yes.

Q. Until what month in 1939?—A. October 1939.

Q. During those six years will you tell the Judge what was the nature of your studies?—A. Well, aside from the secular knowledge, the secular education, there was the Hebrew department which I attended from the morning until three o'clock, and then there was the hour recess, and then we had the English session. The subjects are prerabbinical courses; that is, the same subjects that are taught later on but with less emphasis.

Q. In what period did you say that the lesser emphasis was placed upon the rabbinical studies? In what period?—A. Till 1937; about the first three or four years.

Q. Then from 1937 on the course became more intensive?—A. The course becomes more intensive; yes.

Q. Were the school hours any longer from 1937 on, or were they the same school hours as before 1937?—A. Well, the regular session is still three. From nine to three there are boys there that have to go to school, high school, so naturally they have to allow

the time for the English sessions, but the boys that already
77 graduated high school or for some reason they don't go to high school, or they took a shorter course in the English subjects, and they continued their studies through the day till about five or six o'clock.

Q. Would you say that you were going to school from nine to three from 1937 on? Is that approximately correct?—A. Yes, sir.

Q. What did you intend to be your calling in life as a result of your attendance at the Masifta?—A. Well, I was going to be a practicing rabbi.

Q. A what?—A. A practicing rabbi. I was undertaking the rabbinate as my life's profession.

Q. As your life's profession?—A. Yes, sir.

Q. Are there any rabbis in your family?—A. Well, I have two uncles that are rabbis, and both of my grandfathers were rabbis.

Q. Did they devote their lives to that profession, your uncles and your grandfathers?—A. These relatives are in Europe and I haven't seen any of them.

Q. You mean you know that from family information?—A. Surely. I don't know that. We have letters to the effect, but we know they are rabbis.

Q. Now, you suspended your studies in the Mesifta Talmudical Seminary in October of 1939, did you not?—A. Yes, sir.

78 Q. Will you tell us why?—A. Well, it was in the summer of 1939, about August or thereabouts, I was taken sick with some dizzy spells and I was laid up for a couple of days in the hospital, and the doctors never did find out what was the matter, and I came back. The family physician——

Q. What hospital did you become a patient in?—A. I wasn't in any hospital *in any hospital.*

Q. Oh, excuse me. I thought you said hospital. You mean house?—A. House. House physician. And I went there for a number of examinations and he gave me all kinds of nerve sedatives and pills and it never did help, and he advised that I take a complete rest, which was not for about three months or thereabouts, and then I kept going to him every now and then, and then he said it would be all right for me as a suggested measure to undertake physical labor in order to ease my mind; I should not do any studying.

Q. How old were you at that time?—A. I was nineteen.

Q. Who was the doctor?—A. Dr. Benjamin Hertz.

Q. Where does he practice?—A. In Manhattan, 191 East Second Street, I think.

Q. How did you come to go to a Manhattan doctor, living in Brooklyn?—A. Well, he has been our physician for a number of years.

Q. After you suspended your course, did you remain com-
79 pletely inactive for a certain period of time?—A. Yes.

Q. Until when?—A. Until January.

Q. Of 1940?—A. Yes. The middle of January.

Q. And what did you do in the middle of January 1940?—A. I went to the doctor for another examination, and that is when he suggested that I undertake some physical labor.

Q. And did you?—A. Yes, sir.

Q. What did you do?—A. I got a job at Mr. Irving Bonim's, 15 West 26th Street, Manhattan, as well, I did shipping clerk. I did some selling. I was one of the help in the place.

Q. How did you come to work for this particular man?—A. Well, I went to the, also a friend of mine, principal of the elementary school, and I asked him if he knows an orthodox place where I can get a job; I should not have to work on Saturday; and during a couple of days he informed me of this place.

Q. You mean the principal of the elementary school recommended you to Mr. Bonim's establishment?—A. Yes.

Q. How long did you continue to work there?—A. I was there the year 1940, 1941, and part of 1942.

Q. When did you quit in 1942?—A. That was the end of June or the beginning of July.

Q. When you quit in June or July of 1942, did you resume
80 your day courses at Mesifta?—A. Yes.

Q. Is that the reason you left your job?—A. That is right.

Q. To go back to the day courses?—A. Yes.

Q. But prior to June or July of 1942 you did actually return to the Mesifta?—A. That is right.

Q. To your studies, didn't you?—A. Yes.

Q. When was that?—A. That was in September 1941 I returned to the evening session.

Q. And then you continued to work in the day time?—A. Yes.

Q. And took up your evening courses in Mesifta?—A. Courses in the evening; that is right.

Q. Did Mesifta have evening courses?—A. Yes; surely.

Q. How long had evening courses been an established feature of Mesifta, as far as you know?—A. About eight years I think.

Q. How many hours in the evening did you devote to it?—A. Three hours.

Q. Three hours, and you continued the evening courses until you went back in July of 1942?—A. Yes.

Q. Can you furnish any reason to us why you did not resume your day courses prior to June or July of 1942?—A. Well,
81 the reason the doctor told me to leave the school and go to work, I wasn't sick physically. It was just a mental condition. I had these dizzy spells that didn't let me concen-

trate too much on my studies, and I kept going to the doctor very frequently, every so often, and he just kept giving me these sedatives. He was never able exactly to find what brought on these spells. It would go for a month and then I wouldn't have it for a month, and so on; and while I was working there I was feeling, I felt that I was getting a little better, and it was during one of these oral discussions that one has with the doctor, just suggestive measures, that he said it would be all right for me to go back to the evening session.

Q. Was that how you happened to start back in September of 1941 in your evening courses?—A. Yes.

Q. From July of 1942 on you took the day courses until the time of your induction?—A. That is right.

Q. When were you inducted?—A. I was inducted, I received my induction notice for December 20, but I was inducted to the Army December 26. I was sworn into the army December 26.

Q. When did you first register for the draft, Mr. Samuels?—A. That was on February 16, 1942.

Q. What was the first classification given to you by your local draft board?—A. 4-D.

Q. Do you recall when that was approximately?—
82 A. I think it was in August; about August or September. I think it was September; either the end of August or the beginning of September. I don't know.

Q. Of 1942?—A. Of 1942; yes.

Q. At the time the classification of 4-D was made by your local draft board, had you apprized it of the facts which you have just testified to? Had it known at that time of these facts which you have now testified to?—A. Yes, sir.

Q. As to your being——A. Well, I filed both of my questionaires, the occupational question'aire where I stated the type of work I did and what I do and what I am best fitted for. In there I still wrote that I am best fitted for the rabbinate.

Q. In other words, in the question'aire you described substantially what you have testified to today?—A. Yes, sir.

Q. As to your previous status?—A. Yes.

Q. And as to the occupation that you were engaged in, and so on?—A. On the occupational.

Q. So that you say then when you were classified as 4-D, your draft board knew the things you are talking about now?—A. Yes, sir.

Q. And you remained in that 4-D classification until approximately when?—A. September 1944.

Q. September 1944?—A. 1944; yes.

83 Q. Was it then that your classification was changed?—A. Yes.

Q. To 1-A?—A. 1-A.

Q. Did you thereupon appeal that classification?—A. Yes.

Q. What was the determination of the appeal board?—A. They turned down the appeal.

Q. They sustained the finding of the appeal board?—A. That is right.

Q. I mean, they sustained the finding of the local board?—A. Of the local board.

Q. Did you thereafter resume or attempt to, or rather, did you then approach the local board again in an effort to have your classification changed?—A. Yes, sir.

Q. As a result of the conference at the local board, they continued you in the 1-A classification?—A. Yes, sir.

Q. Has it always been your intention to take up the calling of rabbi?—A. Yes, sir.

Q. How long is it that you have had such a desire?—A. Well, I can say about '36, '35, or '36, that I actually made up my mind to become a rabbi.

Q. How old were you then?—A. I was about sixteen; fifteen and a half; sixteen.

Q. That was about 1935 or 1936?—A. About then.

Q. Do you know when you were to have completed your
84 course at Mesifta had you not been inducted?—A. I probably would have been ordained about a year and a half ago or two years ago maybe. It is really according to the individual, you see.

Q. I don't know whether you understood my question. Had you not been inducted into the army in December of last year, when under normal conditions would you have completed your course for the rabbinate?—A. In June 1945, this year.

Q. When would you have completed your course for the rabbinate had you not suspended your studies for the period that you testified?—A. Well, about the two years that I was away; about two years back; a year and a half.

Q. Approximately 1943?—A. Yes.

Mr. EICHLER. That is all.

Cross-examination by Mr. STANZIALE:

Q. In June of 1939 you say that you discontinued your studies at the Mesifta Seminary?—A. October 1939.

Q. I see. It was not June?—A. No.

Q. Whom did you consult at the seminary in connection with your severance or continuance of your studies in the Mesifta Seminary?—A. I have spoken to the dean.

Q. What is his name?—A. Rabbi Mendlovitz.

Q. Yes.—A. And my immediate teacher, the last

85 teacher I had, Rabbi Rivkin.

Q. What did you say?—A. Well, they knew all along of my physical condition.

Q. As a result of what you told them or someone else?—A. As a result of what I told them.

Q. All right.—A. The days I had been absent. What the teacher told them too.

Q. You got these dizzy spells while you were at camp; isn't that so.—A. Yes.

Q. And then you spoke to your rabbi about it?—A. Yes.

Q. And you told him you were going to discontinue your studies?—A. I told him what the doctor advised, that I discontinue my studies.

Q. Did you tell him for how long a period of time you were going to discontinue your studies?—A. The doctor himself didn't tell me. It was just a suggestive measure to see exactly what can be—the remedy that can be done.

Q. And did the doctor at any time in his examinations with you tell how long you would have to be away from your study?—A. No.

Q. Did the doctor tell you that pursuing the course of study that you had chosen would be detrimental to your health?—A. Yes; a number of times he did. I mean, when I had general physical——

86 Q. And did he tell you that you should do physical work?—A. Well, that was when I got these dizzy spells.

Q. Yes.—A. He advised that I should not have any mental strain, and that is when he advised I do this physical work.

Q. Now, isn't it a fact that at that particular time you then decided that you wouldn't continue your studies any longer and you would continue doing physical work?—A. It was not what I decided. It was what I was forced to do.

Q. And isn't it the fact that from that moment on you severed whatever thoughts you may have had of continuing your studies to become an ordained rabbi?—A. No, sir.

Q. It is not. Now, let's see. In 1940, June 1940, you went to work?—A. January 1940.

Q. Was it January? Now, from October to January you did no physical work?—A. Nothing whatsoever.

Q. Just complete rest and relaxation?—A. That is right. I was home for the three months.

Q. You went to work with the Eaton Textile Co.—A. Yes.

Q. Did you work on machines?—A. No.

Q. What kind of work were you doing?—A. It is a house that sells piece goods; cotton piece goods.

Q. Were you a salesman?—A. I did some selling there,
87 and a stock clerk, shipping clerk.

Q. Now, you continued that work up until when?—A. Until about the end of June. I think it was the beginning of July, to be more exact.

Q. Of what year?—A. 1942.

Q. So you worked all the year of 1940; is that right?—A. Yes.

Q. You worked all the year of 1941?—A. Yes.

Q. Until June of 1942?—A. Yes.

Q. All right. Now, when did you start to go to night school?—A. That was in September 1941.

Q. September 1941. While you were going to night school you were working in the day?—A. Yes, sir.

Q. Didn't your physical efforts interfere with your schooling at night?—A. No, sir.

Q. You worked what time in the day?—A. From nine to six.

Q. And what time did you go to school?—A. Seven-thirty.

Q. From seven-thirty to when.—A. Ten-thirty.

Q. You had to travel from Brooklyn to New York in the morning?—A. Travel to work?

Q. Yes.—A. Yes.

Q. Then you had to travel from New York or Manhattan to Brooklyn?—A. Yes.

88 Q. Now, you continued in the evening course until June, I understood you to say, of 1942. Then you went to the day course?—A. Yes.

Q. Is that correct? Now, you appeared, did you not, before an advisory panel?—A. Yes, sir.

Q. And how many men were seated on this advisory panel?

Mr. EICHLER. Now, if your Honor please, I want to enter an objection at this time to any questions directed to his appearance or participation before an advisory panel. In fact, I will at the same time object to the introduction as part of the selective service file of any of the record which relates to an advisory panel, for this reason: The advisory panel is a peculiar institution existing as a result of the permission of the Director of Selective Service of the City of New York, an advisory theological panel. There is nothing in the selective service regulations which authorizes it. The duty, of course, of classifying a person who is subject to the draft rests in a local board. The regulations provide for an appeal to an appeal board, and then finally, if there is any dissenting opinion by the appeal board, to the President of the United States. That is the procedure outlined in the selective service regulations, and if I am wrong I know Lieutenant
89 Colonel Daly will correct me, and so will Mr. Stanziale.

The theological advisory panel whose city of New York

possessed some peculiar function in the nature, as the title implies, was to advise. Nobody yet seems to know whether it was to advise the local board or an appeal board. At any rate, I maintain that it had no legal or recognized—is authorized function so far as the administrative agency devised by the President of the United States under his powers as conferred upon him by Congress or concerned, and therefore, while we have nothing to conceal, I maintain that anything in the record which relates to an advisory panel has no part, is not evidential, is not competent, is irrelevant, and is not material to the issue, and therefore unless the purpose of this question is to attack the credibility of this witness on the theory that he made certain statements to some particular group, which is different from what he says today, I strongly object to any questioning along those lines and object to the inclusion in the selective service record of any conference that he participated in or any questioning by an advisory panel.

The entire record we consider perfectly proper. We have examined the entire record. It is perfectly proper, and we think the Court should examine it, but we say this, that the eleven
90 pages which purport to be a question and answer examination [illegible] panel, an advisory theological panel, and [illegible] of that advisory theological panel, is not a proper part of the selective service record because there is nothing in the selective service regulations which authorizes the local board or appeal board to rely upon this so-called panel, because there is no authority for its existence. Therefore I ask that that be excluded from the record. It starts with a letter dated August 17, 1944, head note, "Selective Service Headquarters."

The COURT. Overruled.

Mr. EICHLER. Will your Honor permit me an exception?

(Which exception is hereby allowed and sealed accordingly.) (Sealed.)

(The last question is read.)

Mr. EICHLER. I object too for the same reason I have given, if your Honor please.

The COURT. I don't think you need to object to each question. You are stating your objection and the reason for it, and it is applicable to all of this.

Mr. EICHLER. Thank you.

(Which exception is hereby allowed and sealed accordingly.) (Sealed.)

91 A. I have no idea.

Q. Was it five?—A. It might have been more.

Q. When did you appear before this panel?—A. That was in May, I think, 1944.

Q. In May of 1944. Correct?—A. Either May or June of 1944.

Q. Now, you were asked by the gentlemen on the panel concerning your theological ideas?—A. Yes.

Q. You were also asked the time that you began your studies?—A. Excuse me. May I make a statement?

The COURT. Speak up a little louder.

The WITNESS. I say, the reason I hesitated just now, was because I haven't found it on the transcript of the records.

Q. You were asked when you began your studies?—A. There were certain questions that I was asked. The things that I answered, they don't appear on their transcript.

Q. Were you asked when you began your studies for the rabbinate?—A. I must answer possibly. That is the only thing I can answer.

Mr. EICHLER. If your Honor please, if this is a test of the witness's recollection as to what he was asked and what he answered before a theological panel, I submit that Mr. Stanziale has the questions and answers, and I strongly object to this type of
92 questioning. There is the record of what he was asked and what he answered. That is the thing I objected to, but so long as your Honor has overruled it, I maintain that this is a very unfair way of attempting to test the witness's credibility months later. His testimony is that he appeared before a panel of some five men, some six or seven months ago. Now, to ask him, weren't you asked this, and so forth, and what was your answer—I think that is an unfair test. There has been no attack on his credibility so far.

The COURT. I think he can be examined on that, and I am going to continue to rule that way, and if you make an objection and a speech every time he asks a question, we will be here a long time.

Mr. EICHLER. I did not intend to, but I only want to emphasize the point that it is an unfair way to test his memory.

The COURT. I will state to you in the record that, although this habeas corpus may not come under the rules, I will apply the rules of civil procedure, and you need not continually make your objection. It goes to the entire line of testimony, and if it is improper I will try not to consider it when I read it and it is before the Court, and we will expedite the hearing very briefly now if
93 you will just—Your objection is there and your exception is to the whole line of testimony.

(Which exception is hereby allowed and sealed accordingly.) (Sealed.)

Q. You were also asked, were you not, Mr. Samuels, in connection with your leaving the rabbinical school in June of 1939?—A. In October 1939.

Q. You say in October. Very well. Now, you did take employment in 1940?—A. Yes.

Q. Now, after this hearing was conducted by the advisory panel on theological students, you then were reclassified, weren't you, from 4-D to 1-A?—A. Yes.

Q. And your reclassification was effected by Local Board 193 on or about the period of August 22, 1944?—A. Yes.

Q. Is that correct? Now, after you were reclassified 1-A, you then appealed that classification to the appeal board?—A. Yes. I asked for hearing and then for an appeal; the regular channels.

Q. You appealed from your classification of 1-A from the local board to the appeal board?—A. Yes, sir.

Q. At the time that you appealed you submitted, both to the local board and to the appeal board, all the facts in connec-
94 tion with your case; isn't that so?—A. The facts were already there in 1942. I didn't have nothing to add except what was already in the questionaire before.

Q. You submitted in addition to that, did you not, letters from approximately twelve rabbis?—A. Yes, sir.

Q. Attesting that you were a reabbinical student?—A. Yes, sir.

Q. And these letters that you submitted to your local board were transferred to your appeal board in consideration with your appeal, were they not?—A. I have no idea of that.

Q. And you had submitted them to the local board with your appeal?—A. Yes.

Q. Now, after you submitted these twelve letters and additional statements in connection with your position as to whether you were a student to be classified four D, you then received notication that the appeal board had rejected your appeal and confirmed your classification by your local board; isn't that so?—A. Yes.

Q. All right.—A. Excuse me, sir.

Q. Yes.—A. The distric' attorney lay stress on the fact that after the letters were sent in the local board or the appeal board still saw it proper to disqualify the statements.

Q. That is right.—A. I was told by the local board
95 at the hearing that the bringing of letters has no value whatsoever.

Q. But you did submit letters?—A. Yes; but they told me right then and there before I brought the letters, that they wouldn't have any value whatsoever. In other words, the facts that they based their hearing on was something that they already had two years before. It was on the advice of the panel only, and they stated so in their statements.

Q. But in spite of that advice, as you say, you did submit with your appeal the letters of twelve rabbis attesting that you were a bona fide rabbinical student?—A. Yes, sir.

Q. And you then received on October 25th a 1-A classification affirming the local board?—A. Yes.

Q. After you received the notification from the appeal board that your appeal had been rejected, you then wrote letters to the board, did you not, asking for a reopening of your case?—A. Yes.

Q. And for a restatement of your position in connection with your rabbinical status?—A. Yes, sir.

Q. And you then brought to the board Rabbi Quinn?—A. One second. I asked for a reopening on additional evidence——

Q. That's right.—A. That was brought in here.

96 Q. And you were accorded a hearing, weren't you?—A. That is right.

Q. And at this hearing, which was sometime in the month of November 1944, Rabbi Quinn came with you?—A. Yes, sir.

Q. And you then had a hearing at which Mr. Imperato, the chairman of the board, was present, Mr. Logano, and a Mr. White, who was also of the Jewish faith?—A. Yes.

Q. And conducted an investigation in connection with your case; is that correct?—A. I don't know if they conducted an investigation. All I know, they sat at the hearing.

Q. And both you and Rabbi Quinn gave additional testimony at that particular hearing?—A. Yes, sir.

Q. And after that hearing you were still continued in the 1-A classification?—A. Yes, sir.

Q. You then received from the local board, did you not, a notice to appear for induction?—A. Yes, sir.

Q. And you then after a particular time desired a reopening of your case, or a stay of your induction?—A. Well, I was notified by the board that they would reconsider the case.

Q. And they did reconsider?—A. They told me to come down at a certain evening, and when I came there with Rabbi Quinn, the clerk notified me that they reconsidered it without my presence two days previous.

97 Q. And stated that they were still of the opinion that you should be continued in 1-A?—A. No; they didn't state that.

Q. What did they state to you?—A. There was a letter of induction. That was their statement.

Q. And you finally on December 26th were sworn into the United States army?—A. Yes, sir.

Q. Now, you also filed in 1942 what is known as an occupational question'aire?—A. Yes, sir.

Q. You in that occupational question'aire gave a social security number?—A. Yes, sir.

Q. For what purpose did you obtain a social security number if you continued to pursue your studies and finally become ordained as a rabbi?—A. I did not continue to pursue my studies

when I was working. As soon as I worked the nature—The wording of your question is a little——

Q. I don't intend to. I mean, why did you get a social security number if you intended to continue in the rabbinate?—A. I understood that was a ruling of the Department of Labor. Anyone working must get a social security card.

Q. Did you notify Mr. Bonim that you were going to work temporarily there?—A. I didn't know myself how long I was going to work, a month, a year, maybe more. I had no idea.

Q. Did you after you started to work notify either of the rabbis, Rabbi Quinn or Rabbi Rivkin, over how long a
98 period you possibly would be away from your studies?—A. No.

Q. Did you ever ask your doctor, Doctor Hertz, how long you would be away from your studies?—A. No.

Q. Well, when did you intend to recommence your studies for the rabbinate?—A. As I said before, it was during one of these oral discussions that the doctor uses to diagnose sometimes his cases, that he said it was all right, it would be all right for me to continue my studies. First he told me to take it easy. That is when I went back to the evening session, and then when I felt that I was getting much better, that is when I came back to the day session.

Q. When you went to the evening session for the first time, had you consulted your physician as to whether it was all right for you to go to the evening session?—A. Yes.

Q. When was that?—A. Well, the exact date I don't know, but I came back to the evening session, it was September 1941.

Q. Did you tell your doctor that you were going to work in the day time from seven until six, and that from seven-thirty until ten-thirty you were going to study?—A. Well, I was never under the doctor's care since 1939 for physical ailment. It was only this mental, dizzy spells that I kept complaining of.

Q. But you told us that you told the doctor sometime
99 before July of 1942, when you started your evening courses, that you consulted your doctor.—A. Yes. I am going to him during this period of years; surely.

Q. Did the doctor tell you it was too much of a strain to work from seven until six and then from seven-thirty to ten-thirty to go to school?—A. No, sir.

Q. Did he tell you it was all right?—A. No, sir. Physically I was all right.

Q. What made you change from night school to day school and discontinue your work?—A. I felt that I was physically getting along well and I wanted to continue my studies on a broader basis.

Q. Why couldn't you have continued your work on the same basis

and then go to school in the evening?—A. Well, the evening session, being that the time limit is much shorter, naturally it takes a longer time, a year or two years, or whatever the—It still depends on the individual.

Q. How much were you earning at the time that you were working?—A. Well, I started with twelve dollars, and when I left it was twenty-five.

Q. You in your question'aire, your occupational question'aire, in 1942 stated that you were a shipping clerk.—A. Yes, sir.

Q. And that you were better suited for the rabbinate?—A. Shipping clerk, selling, stock clerk.

100 Q. In February of 1942 you registered, did you not?—A. Yes.

Q. And you were continued in the 4-D classification up to and including a short time after you had your hearing before the advisory panel on theological students?—A. Well, I had my hearing, I think it was either in May or June, and I got my 1-A classification around September, I think.

Q. After you had appeared before the advisory panel on theological students, you then appeared before the local board, did you not, before you received your final classification of 1-A—A. No, sir.

Q. Sure of that?—A. Yes, sir.

Q. When you received your 1-A, did you speak to the chairman of the board?—A. 1-A?

Q. Yes.—A. Well, I asked for a hearing. When I received my 1-A I asked for a hearing.

Q. How many hearings in all did you have from the time that you received your 1-A classification and were inducted into the Army on December 26th of 1944?—A. Well, there was one. Let's see. There were two official hearings.

Q. And how many unofficial hearings?—A. One. This unofficial hearing was in reference I was called down for this hearing——

Mr. EICHLER. That is enough.

101 Mr. STANZIALE. I have no further questions, Judge Rice.

Redirect examination by Mr. EICHLER:

Q. One question, Mr. Samuels. There has been some talk about this advisory panel. Do you know who these men were?—A. No, sir. I just know of one.

Q. What?—A. I know of one, who was described to me; the one that did most of the questioning.

Q. How many men were there at this panel that you appeared at?—A. At the time I was there there might have been seven or eight, maybe more.

Q. Seven or eight individuals?—A. Yes.

Q. And how long did your interview last before this panel?—A. About six or seven minutes.

Q. Well, the questions and answers were recorded, weren't they?—A. Yes.

Q. By a stenographer?—A. Yes.

Q. The entire conference took six or seven minutes?—A. Yes.

Q. Do you know the profession or occupation of the men on this panel?—A. Well, some of them are lawyers, I am told, some judges, and there are some rabbis on it also.

Q. You were told that. Were they any rabbis there
102 when you were being questioned by this panel?—A. Not to the best of my knowledge.

Q. Well, why do you make that statement when you say not to the best of your knowledge? Why couldn't it have been just the other way?—A. Well, being that I didn't see anyone with skull caps there, and an orthodox rabbi would surely wear a skull cap, I surely took it for granted there were no rabbis present.

Q. Was there anybody there who announced to you that he was a rabbi, whether reformed or orthodox?—A. No, sir.

Q. Were you examined as to your rabbinical knowledge by this panel?—A. No, sir.

Q. Did the local board or your appeal board ever advise you who this panel consisted of?—A. No, sir.

Mr. EICHLER. I desire to call the Court's attention to the fact that the report of the advisory panel in the record is not signed and there is nothing in the record as far as I know, unless Mr. Stanziale wants to correct me, as to who this panel was.

Mr. STANZIALE. Just a minute.

Mr. EICHLER. How will the Court know who the panel was? It is an unsigned report.

Mr. STANZIALE. Here is a statement, if your Honor please. I am reading from the record itself.

Mr. EICHLER. The Court will read it undoubtedly.
103 Mr. STANZIALE. Your Honor, may I proceed?

The COURT. Yes. Go right ahead.

Mr. STANZIALE. Thank you, your Honor. From the advisory panel on theological classification, a statement for the record, which is dated June 21, 1944.

Mr. EICHLER. Completely unsigned.

The COURT. Mr. Stanziale, do you want to read it in?

Mr. EICHLER. Yes.

The COURT. I am going to read that entire record. I will tell you that.

Mr. EICHLER. I only want to lay stress on the fact that this report is unsigned.

The COURT. Well, let's get all the facts in, and then I will hear you.

Mr. EICHLER. I only want to know one thing from Mr. Stanziale, whether that selective service record does indicate who the members of the panel were.

Mr. STANZIALE. The record speaks for itself, your Honor. I haven't seen it.

Mr. EICHLER. You have got the selective service man next to you.

The COURT. You can look at the file and find out.

104 Mr. EICHLER. I have examined the file, your Honor, and that is why I am willing to be corrected on my statement now that as far as I know there is nothing in the record at all, your Honor, as to who that panel was.

The COURT. If it is not in there, I will say you are right. If it is in there. I will find that out.

Mr. EICHLER. Dr. Hertz.

Mr. STANZIALE. I just want to ask one more question of this witness. I am sorry, Judge Rice, but it has developed from the questions.

The COURT. Yes. All right.

Re-cross-examination by Mr. STANZIALE:

Q. There were members of the Jewish faith on this advisory panel, were there not?—A. Well, surely; yes.

Q. What?—A. Yes.

Q. There were. You say that you don't know whether there were any rabbis on this advisory panel because you didn't see any skull caps?—A. Yes, sir.

Q. Do you differentiate between a rabbi, an orthodox rabbi, and a reformed rabbi?—A. Surely.

Q. Do you feel that a reformed rabbi is unable to fairly and squarely classify or listen to your rabbinical views?—A. Yes, sir.

Q. Why?

105 The COURT. Oh, let's not go into that.

Mr. STANZIALE. I withdraw that.

The COURT. That involves a theological discussion and we would be here until next week.

Mr. EICHLER. That is all, your Honor.

BEN HERTZ, called and affirmed on behalf of the petitioner, testified as follows:

Direct examination by Mr. KREEGER:

Q. Dr. Hertz, you are engaged in the practice of medicine?—A. Yes, sir.

Q. For how long a period of time?—A. Since 1926.

Q. You maintain your offices in Manhattan?—A. Yes, sir.

Q. Do you know the relator, Jacob Samuels?—A. Yes, sir.

Q. Have you taken care of the members of his family over any period of time?—A. Yes.

Q. Going back to the year 1939, did Jacob Samuels consult you medically?—A. Yes, sir.

Q. Will you tell us when and in what connection?—A. He had vague symptoms of dizziness and he described certain fainting spells to me. That was all through the latter part of 1939. Physically I was never able to find anything definitely
106 organically wrong with him. These symptoms, you might suspect the possibility of some neurological condition, and I believe it was around September when I suggested to him that he give up studying and see how he will react on medication.

Q. And did you prescribe medication for him at that time?—A. Yes. I remember he had phenobarbital at the time.

Q. Do you know whether he gave up school at that time?—A. I wouldn't know. I advised him to at this time, but I wouldn't know.

Q. Did he come back to see you?—A. He came back early in 1940, at which time he still had his symptoms.

Q. Was there any question between you and him at that time of any physical labor on his part?—A. Why, he suggested that possibly—I did not suggest it to him—he suggested possibly working will not do him any hurt, and I thought it would be a good idea for him to try to do some physical work instead of his studying, and I believe he subsequently did go to work.

Q. Did he consult you during the year 1940?—A. Yes. He was in at irregular intervals.

Q. And did he continue to complain of the dizzy spells?—A. He continued to complain of dizzy spells; yes.

Q. Do you recall his consulting you in 1941, towards the middle of the year, about going back to school part time?—
107 A. Yes. I recall that. I also have a record of suggesting a neurological consultation to him before he went back to school, and I never got a report on that, I don't know whether he ever had this neurological consultation or not, but I allowed him to go back to his studies in 1941.

Q. And was that to be part time or full time in 1941? Do you recall?—A. Well, I suggested a gradual start of his studies and see how he reacts to it.

Q. There has been testimony here, I believe while you were sitting for a few minutes in the courtroom, that he returned in September 1941 to evening session and continued to work during the daytime. Did you know about that arrangement? The latter part of 1941?—A. No, sir.

Q. Did he see you again in 1942?—A. Yes. He has seen me every two months or six weeks.

Q. And in 1942 when he saw you, did he talk with you about his mental condition?—A. Yes.

Q. And did he tell you that he was feeling better at that time?—A. He was feeling better but not completely symptomless.

Q. Did he tell you in 1942 that he was feeling better enough to return to the day course, and did he ask for your opinion?—A. Yes. I believe he told me he was going back to day school.

Q. Was it your opinion that if he felt better he could
108 go back?—A. Yes.

Mr. KREEGER. That is all.

Cross-examination by Mr. STANZIALE:

Q. Doctor, did I understand you correctly at the time that you examined Mr. Samuels, he suggested that he go to work and you approved?—A. I had him quit his studies, and two or three months later I remember he suggested he should go to work, and I agreed with him, it may be a good thing for him.

Q. Do you have any records with you as to how many times you saw him in the year 1940?—A. No. I just have some scrap.

Q. Do you keep any records?—A. Yes; I keep records.

Q. How many times would you say you saw him in 1940?—A. No more than four times probably during the whole year.

Q. 1941?—A. 1941; the early part of the year was his fairly bad year, and that is when I suggested this neurological consultation, and then he came in for a while at two or three week intervals, and then later on less frequent intervals.

Q. You don't know whether he submitted to a neurological examination?—A. I don't know. I questioned his family on it a couple of weeks ago and they don't know anything about
109 it.

Q. You didn't see him in 1942, did you?—A. I saw him before he was inducted.

Q. He was inducted on December 26th.—A. When?

Q. 1944.—A. I don't know just when I saw him before, but I remember seeing him before his induction because I suggested that he get an army encephalogram. I still had my suspicions about his neurological status.

Q. Let's see if we can get some degree of accuracy. You saw him in 1940 about four times?—A. I saw him for his present complaint, for his neurological condition, in 1939 originally, and then in 1940 several times.

Q. 1941 you saw him?—A. 1941 several times.

Q. How about 1942?—A. I believe I have seen him every year since he started off with these complaints.

Q. Can't you tell us how many times in 1942?—A. Irregular intervals. I couldn't say.

Q. And you say you saw him before he was inducted?—A. Yes.

Q. How soon before he was inducted?—A. That I don't recall. I remember giving him some sort of a note about his neurological status.

Mr. STANZIALE. That is all.

Mr. EICHLER. That is our case, if your Honor please.

110 Mr. STANZIALE. If your Honor please, the Government has no rebuttal and relies on the local board file and an argument which it desires to make for the contents of it.

(At this point a short recess is taken, and then Mr. Kreeger argued in behalf of the petitioner and Mr. STANZIALE in behalf of the Government.)

111 In the District Court of the United States
For the District of New Jersey

IN THE MATTER OF THE APPLICATION OF JACOB S. SAMUELS FOR A WRIT OF HABEAS CORPUS

Memorandum opinion

Filed Feb. 19, 1945

Jacob S. Samuels (hereinafter referred to as relator) registered on August 29, 1942, with the Local Board of Kings County, New York, pursuant to provisions of Selective Service and Training Act of 1940, 50 U. S. C. A. 301, et seq. (hereinafter referred to as the Act). He was born December 28, 1920. At the age of thirteen or fourteen years he entered the Mesifta Talmudical Seminary, a Hebrew theological or divinity school at Brooklyn, New York (hereinafter referred to as Seminary), and pursued the prerabbinate course in that institution.

It is admitted that the Seminary is a qualified theological or divinity school within the meaning of 305 (d) of the Act. When relator registered with the local board he was given the classification of IV-D by reason of his statement that he was enrolled at the Seminary and was preparing for the rabbinate. In August 1944, the local board reclassified relator as 1-A, from which

112 classification he appealed. The appeal board sustained the local board. Thereafter a request to review his case and defer induction was denied. The date of his induction was December 26, 1944. Thereafter relator applied for a writ of habeas corpus. The writ was allowed on January 25, 1945, and was served upon General M. Pierson, Post Commanding Officer, Fort Dix, New Jersey.

Obedient to the command of said writ relator was produced in court. The commanding officer filed a response, which in effect set forth that relator was held as a soldier in the United States Army who had been selected and inducted under the provisions of the Selective Service and Training Act, as amended. Annexed to and made a part of the writ was the complete file of the local board.

At the hearing held February 2, 1945, petitioner introduced evidence showing his record of attendance in the seminary and tending to establish the fact that he was at the time of his reclassification and at the time of his induction in good faith pursuing his studies for the purpose of being a practicing rabbi.

Prior to induction petitioner had exhausted all his administrative remedies under the Selective Service and Training Act.

113 He now asserts he is exempt from military service under 305 (d) of the Act, which provides:

"Regular or duly ordained ministers of religion, and students who are preparing for the ministry in theological or divinity schools recognized as such for more than one year prior to the date of enactment of this Act, shall be exempt from training and service (but not from registration) under this Act."

and further, under the Selective Service Regulation 622.44 (a), which is as follows:

"In Class IV–D shall be placed any registrant who is a regular or duly ordained minister of religion or who is a student preparing for the ministry in a theological or divinity school which has been recognized as such for more than 1 year prior to the date of enactment of the Selective Training and Service Act."

The Act provides for local boards which, "under rules and regulations prescribed by the President, shall have power within their respective jurisdictions to hear and determine, subject to the right of appeal to the appeal boards * * * all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this Act of all individuals within the jurisdiction of such local boards. The decisions of such local boards shall be final, except where an appeal is authorized and is taken * * *. The decision of such appeal boards shall be final in cases before them on appeal unless modified or changed by the President, as provided in the last sentence of Section 5 (1) of this act." 50 U. S. C. A. 310 (a) (2). The decision of the appeal board was not modified or changed.

114 Once again the action of a local board is brought to court for review, and again a court must determine to what extent it may or should review or interfere with the classification made by local boards under the Selective Service Law.

The Selective Service and Training Act makes no provision for judicial review of classifications of local boards. Yet it is generally conceded that due process of law requires that the courts be open, subject to certain limitations, to those who desire to challenge the action of such boards. United States v. Cain, 144 F. 2d, 944. The right to review, however, does not transfer to the courts the right to reclassify. Ex Parte Stanziale, 138 F. 2d, 312.

Although the local board is the agency charged with the duty of administering Selective Service, the law that governs in judicial review of acts of Administrative Boards is not controlling. "The task of classification of the nation's manpower for service in its defense differs greatly from the ordinary administrative action affecting an individual or a group. It is country wide in scope, it includes a large portion of the population, and obviously its operation must be both smooth and swift if the public object is to
115 be accomplished. The enemy will not wait for the process of litigation to determine who must and who may not fight." Ex Parte Stanziale, supra.

Recognizing the distinction between local draft boards and Administrative Boards generally, a narrower limit has been fixed governing the scope of judicial examination of the findings of local draft boards. The limited scope of such examination is discussed at length in both United States v. Cain (2 C. C. A.) supra, and Ex Parte Stanziale (3 C. C. A.), supra. In United States v. Cain the rule seems to be that the "examination is only to determine whether there is any evidence at all to support the findings of the local board." In Ex Parte Stanziale the rule seems to be be established that "the test of whether a draft board's action may be attacked seems to shift from whether its findings are supported by substantial evidence to whether it received and considered what a particular registrant submitted. And lack of such consideration is not here, as it is not elsewhere, proved by proving that the decision was wrong."

The local board found, in effect, that relator was not in good faith pursuing his studies for the purpose of becoming a rabbi. The file of the local board in evidence here discloses, in part
116 at least, the basis of this determination. Included in the file is a report (unsigned) of an Advisory Panel on Theological Classification. Relator admits that he appeared before such a panel. At the hearing herein he objected to this report and to its introduction as a part of the local board file, principally on the ground that "there is nothing in the selective service regulations which authorizes it." Such panels seem to be used generally by local boards in the city of New York. See United States, ex rel. v. Cain, supra, in which case the propriety of their use was recognized.

The local board is not circumscribed in its method and manner of procuring information regarding registrants and their classifications to such an extent that it may not call in experts or qualified persons to aid them in their work. Of course the board is not bound by their advice. The final decision is for the board, after a consideration of all pertinent facts before it, including the report of the panel, to which report the board may give such weight as they deem it entitled to receive.

Without attempting to outline the evidence contained in the file, it is sufficient to say that the hearing by the court disclosed that every contention now made by relator and all the facts presented to the court were presented to and considered by the local board and the appeal board. The relator in his testimony so admitted.

117 Did the local board have the right to determine the good faith of the relator? We think so. The exemption is for those students *preparing* [emphasis supplied] for the ministry. What was said in United States v. Cain, supra, at page 949, regarding the regulation concerning ordained rabbis is applicable here. It should not be presumed that Congress intended this exemption to be a sanctuary for those desiring not to serve in the armed forces.

It is not the province of the court in this proceeding to determine whether the finding of the local board was right or wrong. No opinion is now expressed as to that. It is the court's opinion that the finding of the local board in reclassifying relator is supported by evidence; and the board having fully and completely heard the relator, this court may not now say that its action was capricious or arbitrary. United States v. Cain, supra; In re Stanziale, supra.

The petition is dismissed and the writ is quashed.

Dated this 19th day of February 1945.

/S/ EUGENE RICE,
United States District Judge.

118 In United States District Court

[Title omitted.]

Order dismissing writ of habeas corpus

Filed March 9, 1945

The petitioner herein having verified and filed his petition dated December 27, 1944, praying for a Writ of Habeas Corpus directed to Brigadier General Madison Pearson, Commanding Officer at Fort Dix, New Jersey, commanding him to produce the body of

Jacob S. Samuels, and the Writ having been duly issued out of this Court by the Honorable Eugene Rice, then one of the judges assigned to this Court on January 25, 1945, and the respondent, Brigadier General Madison Pearson having filed his Return to the Writ of Habeas Corpus and the petitioner, through his attorney having traversed the Return and testimony having been taken in open Court,

Now, upon reading and filing the Petition of Jacob S. Samuels verified on the 27th day of December 1944, the Writ of Habeas Corpus issued out of this Court on January 25, 1945, and the Return of the respondent filed February 2, 1945, the traverse of the petitioner and having heard the testimony and examined the exhibits introduced by the petitioner and respondent respectively and after having heard the attorney and solicitor for the
119 petitioner in support of the same and the Honorable Thorn Lord, United States Attorney by Charles Stanziale, Esquire, Assistant United States Attorney, and due deliberation having been had and upon reading and filing the opinion of the Court,

Now, upon motion of Thorn Lord, United States Attorney by Charles Stanziale, Assistant United States Attorney,

It is ordered that the Writ of Habeas Corpus heretofore issued out of this Court on January 25, 1945, be and the same is hereby dismissed.

(S) EUGENE RICE,
United States District Judge.

Done at Newark, New Jersey, this 27th day of February 1945.

120 In United States District court

[Title omitted.]

Notice of appeal

Filed March 22, 1945

SIRS:

Please take notice that Jacob S. Samuels, the relator herein, hereby appeals to the United States Circuit Court of Appeals, Third Judicial Circuit, from the order made in this proceeding by Hon. Eugene Rice, Judge of the United States District Court, on the 2nd day of March 1945, and entered in the office of the Clerk of the United States District Court for the District of New Jersey on the 6th day of March 1945, dismissing the relator's petition herein for a Writ of Habeas Corpus for his release from the custody of General M. Pierson, Post Commanding Officer of Fort Dix, New Jersey, the respondent herein, and quashing said Writ of

Habeas Corpus, and that said Jacob S. Samuels, the relator herein, hereby appeals from each and every part of said order, as well as from the whole thereof, on both questions of law and on question of fact.

Dated: March 8, 1945.

Yours, etc.

GEORGE M. EICHLER,
26 Journal Square, Jersey City, N. J.,
Attorney for Relator, Jacob S. Samuels.

To:

THORNE LORD,
United States Attorney,
For the District of New Jersey.

BENJAMIN F. HAVENS,
Clerk of the U. S. District Court,
For the District of New Jersey.

Service acknowledged this 14th day of March 1945.

THORN LORD,
U. S. Atty.

GROVER C. RICHMOND,
Asst. U. S. Atty.

121 In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]

Order extending time

Filed Aug. 23, 1945

Upon the consent of the United States Attorney for the District of New Jersey, it is hereby

Ordered, that the time of the relator-appellant herein to serve and file his Record on Appeal be and the same hereby is extended to the 31st day of August 30, 1945.

Dated: July 30, 1945.

GOODRICH,
Judge, U. S. Circuit Court of Appeals,
For the Third Circuit.

The above order is hereby consented to.

Dated: July 23, 1945

(s) THORN LORD,
United States Attorney.

Certified copy from U. S. Circuit Court of Appeals for the Third Circuit.

122 In United States District Court

[Title omitted.]

Order extending time

Filed June 27, 1945

To the Honorable District Court of the United States for the District of New Jersey:

Upon the annexed stipulation and at the request of the attorneys for all of the parties hereto, it is hereby

Ordered, that the time of the relator-appellant herein to serve and file his record on appeal be and the same hereby is extended to the 30th day of July 1945.

Dated: June 27, 1945.

GUY L. FAKE,
Judge, United States District Court.

The entry of the within order extending the time of the relator-appellant to serve and file Record on Appeal in the above case is hereby consented to.

Dated: June 27, 1945.

GEORGE M. EICHLER,
Attorney for Relator-Appellant.
THORN LORD,
U. S. Atty. for Respondent-Appellee,
By VINCENT E. HULL,
Asst. U. S. Atty.

123 In United States District Court

[Title omitted.]

Order vacating order extending time

Filed June 27, 1945

It appearing, upon motion of Thorn Lord, United States Attorney for the District of New Jersey, by Vincent E. Hull, Assistant United States Attorney, that an order was heretofore entered on this date in this court extending time for serving and filing the record on appeal herein to July 30, 1945, and further, that the court was without authority to enter such order,

It is ordered that the aforesaid order of extension be and the same is hereby vacated and set aside.

June 27, 1945.

GUY L. FAKE,
Judge, United States District Court.

124 [Clerk's certificate to foregoing transcript omitted in printing.]

125 In United States Circuit Court of Appeals for the Third Circuit

Docket No. 8897

UNITED STATES OF AMERICA, EX REL JACOB S. SAMUELS, REALTOR-APPELLANT

v.

BRIGADIER-GENERAL MADISON PEARSON, RESPONDENT-APPELLEE.

Order to show cause

Filed Oct. 10, 1945

On reading and filing the annexed affidavit of Meyer Kreeger, sworn to the 8th day of October 1945, and upon the writ of habeas corpus issued herein by Mr. Justice Rice of the United States District Court, sitting in New Jersey, and the petition on which it was granted, upon the Notice of Appeal and the Record on Appeal filed in this Court on the 30th day of August 1945, and upon all of the papers and proceedings herein had,

Let the respondent-appellee, Brigadier General Madison Pearson, Post Commanding Officer, Fort Dix, New Jersey, his representatives and aids who may have had the custody of Jacob S. Samuels up to October 8, 1945, show cause on Thursday, October 11, 1945, at 10:30 A. M., in the forenoon of that day, at the Courthouse, 9th and Chestnut Streets, Philadelphia, Pa., why an order should not be made herein directing the return of the said Jacob S. Samuels, the relator herein, to the jurisdiction of this Court, and why during the pendency of and until the determination of the appeal herein after the said return of relator to the jurisdiction of this Court the said Brigadier General Madison Pearson, Post Commanding Officer, Fort Dix, New Jersey, his representatives and aids who may then have the custody of the said Jacob S. Samuels should not be stayed, enjoined, and restrained from

126 removing or causing the said Jacob S. Samuels to be removed from the jurisdiction of this Court and/or the territorial limits of this Court.

Sufficient cause appearing therefor, Let service of a copy of this Order to Show Cause, together with the attached affidavit, upon the office of the U. S. Attorney in Trenton, New Jersey, on or before 2:00 P. M. o'clock of Wednesday, October 10, 1945, be deemed good and sufficient service.

Dated: Philadelphia, Pa., October 10, 1945.

GOODRICH,
U. S. Circuit Court Judge
For the Third Circuit.

127 IN THE UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted.]

Affidavit of Meyer Kreeger

Filed Oct. 10, 1945

Meyer Kreeger, being duly sworn, deposes and says:

1. That he is of counsel for the above named relator-appellant and makes this affidavit in support of the within Order to Show Cause to direct the return of the relator to the jurisdiction of this Court.

2. That relator, a student preparing for the rabbinate in a recognized theological seminary on the Selective Service List, was inducted into the Armed Forces of the United States.

3. That on relator's application a writ of habeas corpus was obtained, signed by Mr. Justice Rice of the United States District Court, sitting in New Jersey. After the hearing and submission of briefs an order was entered on February 27, 1945 dismissing the writ. An appeal was taken and pending appeal relator was returned to the custody of respondent.

4. That because of the decision favorable to relator by the Circuit Court of Appeals, Second Circuit in the case of U. S. ex rel Levy v. Cain, 149 Fed. (2d) 338, deponent was advised by Mr. Hull, the Assistant U. S. Attorney for New Jersey, that the file in this case, as well as in a number of similar cases in which deponent is counsel, was requested by and sent down to
128 Washington during the summer for review with the possibility that the rule of the Second Circuit might be applied to this case. Because of that, it was agreed to withhold filing of the record until Washington determined its policy.

5. That on August 10, 1945, deponent was advised by Mr. Hull that Washington had decided to contest the appeal. His language is as follows:

"Referring to the above case, you are now advised that we have decided to contest the appeal. We desire that you proceed promptly, and, for the reason that the appellant's military status remains unsettled, that you comply in full with the time limitations of the rules of the Third Circuit Court."

6. That accordingly, deponent caused two copies of the record to be filed on August 30, 1945, and pursuant to permission obtained from this Court appellant's brief and appendix will be filed in this Court, and copies served upon the U. S. Attorney in New Jersey, on October 10, 1945.

7. That during all of this time the said relator, Jacob S. Samuels, was kept in custody at Fort Dix, New Jersey, pending the determination of the appeal.

8. That deponent has been advised this day by telephone call from the said Jacob S. Samuels that he has been shipped away from Fort Dix and outside of the jurisdiction of this Court.

9. That deponent has telephoned the Second Army Command and spoken to Major Carey, and was advised that Jacob S. Samuels was shipped to a camp which is outside of the territorial limits of this Circuit. Deponent has also spoken to Mr. Hull, the Assistant U. S. Attorney, and was similarly apprised of the same fact. Both Mr. Hull and Major Carey stated orally that Jacob S. Samuels would be returned to the jurisdiction of this court immediately upon the order of this Court at any time.

129 10. Deponent also spoke, today, to Major Samuel Beech of the Judge Advocate General's office in Washington D. C., who also stated that if the Court should make a direction to that effect Jacob S. Samuels would be returned immediately to the jurisdiction of the Third Circuit.

11. That deponent has been further advised this day that Jacob S. Samuels has been removed to Camp Belvoir, Virginia, which is outside of the territorial jurisdiction of this Court.

12. That the rights of the relator-appellant herein has been impaired by the removal from this jurisdiction for it may make his case entirely moot under the authority of the United States Supreme Court in the case of U. S. ex. rel. Lynn, v. Downer, 322 U. S. 756; rehearing denied 65 S. Ct. 426, where it was held that a removal of the soldier in a similar case from the jurisdiction rendered the question moot and thus prevented relator in that case from obtaining a final determination of his case.

13. That Rule 17 of this Court, subdivision 4, specifically says:

"The initial order respecting the custody or enlargement of the prisoner pending review, as also any recognizance taken, shall be deemed to cover not only the review in this court but also the further possible review in the Supreme Court; and only where special reasons therefor are shown to this court will it disturb that order, or make any independent order in that regard."

14. That this Court has made no order in that regard in this case respecting custody, nor has any further order been made or entered, to the best of deponent's knowledge, by the lower court.

15. That if the Army authorities be allowed to remove relator in this case from the jurisdiction of this Court and to keep him so removed in the State of Virginia, where deponent is advised

130 and verily believes he is at present, then the same Army authorities can continue to remove him to any other portion of the country and make it impossible for the relator to obtain a

final determination of his case. That such a practice would result in obtaining writ after writ in the various jurisdictions to which the man is moved and would make the remedy of habeas corpus practically futile.

16. That in view of the fact that this appeal can be heard in a short time, as the appellee's brief will be due on October 30th, 1945, and in view of the fact that the Government is prepared to return the man to this jurisdiction if the Court so orders, deponent respectfully asks this Court for an order directing the respondent-appellee to return relator forthwith to the jurisdiction of this Court.

17. That deponent makes this affidavit in person because he is acquainted personally with the facts herein stated.

18. That no previous application for this or similar relief has been made to any other court or judge.

19. That because of all of the above, deponent moves by way of an order to show cause and respectfully asks that this order be made returnable Thursday, October 11, 1945.

MEYER KREEGER.

Sworn to before me this 8th day of October 1945.

MAX L. FINKELSTEIN,
Notary Public, Bronx County.

[File endorsement omitted.]

192 In United States Circuit Court of Appeals

[Title omitted.]

Order assigning judge

Filed Oct. 11, 1945

And now, to wit: this 11th day of October A. D. 1945, it is ordered that Hon. Albert Lee Stephens, U. S. Circuit Judge, for the Ninth Circuit, be, and he is hereby assigned to sit in above case in order to make a full court.

GOODRICH, *Circuit Judge.*

193 In the United States Circuit Court of Appeals

[Title omitted.]

Minute entry

And afterwards, to wit, the 11th day of October 1945, come the parties aforesaid by their counsel aforesaid, and this case being called for hearing on Appellant's Motion for Rule to Show Cause, before the Honorable Herbert F. Goodrich, Honorable Albert Lee

Stephens, and Honorable Gerald McLaughlin, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 22d day of October 1945, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

134 In United States Circuit Court of Appeals

[Title omitted.]

Order denying application for relator's return to this jurisdiction, etc.

Filed Oct. 22, 1945

Before ALBERT LEE STEPHENS, GOODRICH, and MCLAUGHLIN, Circuit Judges

On this 22nd day of October 1945 the application for return of relator, Jacob S. Samuels, to the jurisdiction of this Court, and for injunction, enjoining, and restraining Brigadier General Madison Pearson, Post Commanding Officer, Fort Dix, New Jersey, his representatives and aides from removing Jacob S. Samuels from the jurisdiction of this Court is herewith ordered denied.

GOODRICH, *J.*

[File endorsement omitted.]

135 In the United States Circuit Court of Appeals

[Title omitted.]

Minute entry

And afterwards, to wit, the 9th day of November 1945, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs; before the Honorable Albert B. Maris, Honorable Herbert F. Goodrich, and Honorable John J. O'Connell, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 15th day of November 1945, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

136 In United States Circuit Court of Appeals
For the Third Circuit

No. 8897—October Term, 1945

UNITED STATES EX REL. JACOB S. SAMUELS, APPELLANT

v.

GENERAL MADISON PEARSON, POST COMMANDING OFFICER, FORT DIX, NEW JERSEY

No. 8992—October Term, 1945

UNITED STATES EX REL. HARRY HOROWITZ, APPELLANT

v.

GENERAL MADISON PEARSON, POST COMMANDING OFFICER, FORT DIX, NEW JERSEY

Appeals from Orders of the District Court of the United States for the District of New Jersey

Argued November 9, 1945

Before MARIS, GOODRICH, and O'CONNELL, Circuit Judges

Opinion of the court

Filed November 15, 1945

PER CURIAM:

The relators in these two cases claimed exemption from military training and service under the Selective Service Act. The claim of each was based upon the asserted fact that he was a student preparing for the ministry. The local board of each at first granted him exemption but, after receiving from the New York City Director of Selective Service the statement and recommendation of an "advisory panel on theological classifications" and after further proceedings not necessary here to relate, cancelled his exemption and reclassified him in Class IA. Each was subsequently inducted into the army and then sued out a writ of habeas corpus in the district court, which after hearing that court discharged. The present appeals followed.

In each of these cases, as in the case of United States ex rel. Levy v. Cain, 149 F. 2d 338 (C. C. A. 2, 1945), the membership of the "advisory panel" was cloaked in anonymity, its statement not being signed, and the identity of its membership not being disclosed to the relator or appearing in the record of the proceedings before the local board. In each case it made through the New York City

Director of Selective Service a recommendation to the local board as to the action which the board should take.

We fully agree with the conclusion reached by the Circuit Court of Appeals for the Second Circuit that the interjection of the statement and recommendation of the "advisory panel" into the proceedings of the local boards vitiated those proceedings and rendered the relator's reclassification and induction invalid. The reasons for this conclusion are stated in Judge Learned Hand's opinion in the cited case with such clarity and force as to require no amplification by us.

Accordingly in each case the order of the district court is reversed and the cause is remanded to that court with directions to discharge the relator from military custody, without prejudice to further lawful proceedings under the Selective Service Act in his case.

137 In the United States Circuit Court of Appeals
for the Third Circuit

No. 8897—October Term, 1945.

UNITED STATES OF AMERICA, EX REL. JACOB S. SAMUELS, APPELLANT

vs.

GENERAL MADISON PEARSON, POST COMMANDING OFFICER, FORT DIX, NEW JERSEY

Judgment

Filed Nov. 15, 1945

Present: MARIS, GOODRICH, and O'CONNELL, Circuit Judges

On appeal from the District Court of the United States, for the District of New Jersey.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of New Jersey, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, and the cause is remanded to that court with directions to discharge the relator from military custody, without prejudice to further lawful proceedings under the Selective Service Act.

By the Court.

MARIS, *Circuit Judge.*

NOVEMBER 15, 1945.

[File endorsement omitted.]

138 [Clerk's certificate to foregoing transcript omitted in printing.]

139 In the Supreme Court of the United States

Order extending time within which to file petition for certiorari

On consideration of the motion of the Solicitor General in the above-entitled cause, and good cause therefor having been shown, it is now hereby ordered that the time within which a petition for writs of certiorari may be filed herein be and the same is hereby extended for a period of 30 days from February 15, 1946.

Dated this 12th day of February 1946.

HAROLD H. BURTON,
Associate Justice of the
Supreme Court of the United States.

U. S. GOVERNMENT PRINTING OFFICE: 1946

Supreme Court of the United States

Order allowing certiorari

Filed May 27, 1946.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice JACKSON took no part in the consideration or decision of this application.

FILE COPY

No. 58 59

Nos. 58 and 59

In the Supreme Court of the United States

October Term, 19

[illegible]

[illegible]

[illegible]

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 947

GENERAL MADISON PEARSON, POST COMMANDING OFFICER, FORT DIX, NEW JERSEY, PETITIONER

v.

UNITED STATES EX REL. HARRY HOROWITZ

No. 948

GENERAL MADISON PEARSON, POST COMMANDING OFFICER, FORT DIX, NEW JERSEY, PETITIONER

v.

UNITED STATES EX REL. JACOB S. SAMUELS

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the petitioner, prays that writs of certiorari issue to review the judgments of the United States Circuit Court of Appeals for the Third Circuit, entered November 15, 1945 (No. 947, R. 48, 51; No. 948, R. 68), ordering respondents discharged from military custody on the ground that they were illegally classified by the Selective Service System.

OPINION BELOW

The opinion of the circuit court of appeals in these cases (No. 947, R. 47–48; No. 948, R. 67–68) is reported at 151 F. 2d 801.

JURISDICTION

The judgments of the circuit court of appeals were entered November 15, 1945 No. 947, R. 48; No. 948, R. 68). On February 12, 1946, Mr. Justice Burton extended the time for filing petitions for writs of certiorari in both cases until March 17, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Respondents claimed exemption from military service as students preparing for the ministry. Before finally classifying them their local boards referred their cases to an advisory panel on theological classifications (which was established by the New York City Selective Service Headquarters) for an advisory recommendation, which the boards thereafter considered together with all the other evidence in respondent's selective service files. The question presented is whether it was proper for the selective service boards to consider these advisory recommendations in classifying respondents.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Selective Training and Service Act and of the Selective Service

Regulations are set forth in the Appendix, *infra*, pp. 29–34.

STATEMENT

Each respondent registered under the Selective Training and Service Act and thereafter claimed exemption from military service as a *bona fide* student in a recognized theological school preparing himself to be a rabbi in the Jewish religion. Their claims were ultimately rejected and each was classified I–A and inducted into the Army. Shortly thereafter separate petitions for writs of habeas corpus were filed on their behalf in the United States District Court for the District of New Jersey seeking their release from military custody on the ground that their local boards had arbitrarily and capriciously denied them classification in IV–D as students preparing for the ministry (No. 947, R. 3–7; No. 948, R. 2–4). Petitioner filed a return (No. 947, R. 8; No. 948, R. 5) in each case and hearings were had in which the selective service file of each respondent was received in evidence. Thereafter the court entered findings of fact and conclusions of law adverse to respondents and ordered the writs of habeas corpus dismissed (No. 947, R. 37–39; No. 948, R. 55–59).

Each respondent took an appeal to the Circuit Court of Appeals for the Third Circuit and that court reversed the judgments of the district court and ordered respondents released from military custody. Relying on *United States ex. rel. Levy* v. *Cain*, 149 F. 2d 338 (C. C. A. 2), the

court below held, in a single *per curiam* opinion, that it was improper for the selective service boards to consider the statement and recommendations of the advisory panel on theological questions established by the Selective Service System to the effect that respondents were not bona fide students preparing for the ministry.

The pertinent facts relating to respondents' selective service classifications, as revealed by their respective selective service files, may be summarized as follows:

Horowitz.—Respondent registered under the Act and in January 1941, he filed his questionnaire and an accompanying statement in which he said that he was a student at the College of the City of New York preparing for a career as a psychiatric social worker,[1] and that if he was selected for induction he desired his induction to be postponed until the close of the 1941 academic year. In this statement he said, in part:

> * * * My request is that you defer my drafting until February, 1943. At that time I will have been graduated from college. I will have been able to save enough money for graduate work and some to spare to tide me over after my year of service. I would have had time to become

[1] The college authorities advised the local board that Horowitz was in "substantially full time attendance" at the college.

a known cantor who could spare a year's absence. And when I returned, I would be able to seek employment in my field with a bachelor's degree in my pocket—employment which I could not expect without the diploma. In other words if you take me now, you practically negate my possibilities to attain the position I seek in life, namely, a psychiatric social worker.

On May 10, 1941, Horowitz was physically examined and found qualified for general military service. Less than two weeks later the local board was advised that Horowitz had been enrolled in the Rabbinical Seminary of America* for the scholastic term beginning in September 1941.

On July 1, 1941, the academic year at City College having ended, Horowitz was classified I–A, and on his appeal to the board of appeal he was again classified I–A on August 25, 1941. In the meantime he had claimed classification as a student preparing for the ministry, and he undertook to supply the local board with additional evidence to support this claim. In an affidavit dated July 16, 1941, Horowitz stated that before May 1941, he "had not disclosed my intention to become a rabbi because I had no concrete facts to present; I had merely hopes." On November 2, 1941, Horo-

*An acknowledged seminary of theological study recognized by the Selective Service System.

witz was classified IV–D by the local board, and he retained this classification until May 1944.[4]

In April 1944, the Director of Selective Service for New York City undertook a review of Horowitz' selective service file and in the course of that review he was requested to appear before the advisory panel on theological classifications (see *infra*, pp. 20–21). A hearing was had before the panel on May 2, 1944, at which Horowitz furnished additional evidence and full inquiry was made into his claim that he was a *bona fide* student preparing for the ministry. A transcript of this hearing was made and was sent to the local board on May 10, 1944, This letter transmitting the transcript, signed by the Chief, Legal Division, New York City Headquarters, advised the local board that:

> There is returned herewith the cover sheet and file of the above named registrant

---

[4] On June 12, 1942, relator filed his Selective Service Occupational Questionnaire in which he stated that he was taking a course in rabbinical studies at the Rabbinical Seminary of America, which he expected to complete in 1947 or 1948; and that he was taking a course in Bachelor of Social Science at the College of the City of New York which he expected to complete in June 1944. Relator stated that the job for which he was best fitted was Group Worker for Children, and that he had four years experience in such work. Under "duties of job for which you are best fitted" he stated: "I have supervised as a volunteer worker children's clubs and have served as a leader of an individual club as well as director of all." Under "job for which you are next best fitted" he stated "None". He stated that his present job was that of student and under Professional and Scientific Workers he listed himself as a Social worker.

submitted to this Headquarters for administrative review.

On May 2nd the registrant appeared before the appropriate division of our advisory panel on theological classifications, composed of eminent clergymen and laymen. After reviewing the file and examining the registrant, and upon consideration of all the circumstances, the panel voted to recommend that registrant's status does not warrant his classification in Class IV–D. A transcript of the evidence taken at the hearing is enclosed herewith.

It is requested, therefore, that the Local Board reopen and reconsider the registrant's classification of Dec. 2nd, 1943 in the light of the additional evidence presented and advise this Headquarters of the action taken in the matter.

Of course, while the Local Board should give careful consideration to the recommendation of the advisory panel, formal determination of the registrant's classification must rest with the Board itself or the appropriate appeal agency.

* * * * *

Shortly thereafter there was also forwarded to the local board a statement for the record, dated May 2, 1944, which had been prepared by the advisory panel. The local board was directed that "The statement should be added to the registrant's file and considered together with the other information of record in determining the registrant's classifica-

tion." The panel's statement contained a general discussion of educational practices in the field of Jewish education and it spelled out the considerations which the panel regarded as significant in considering Horowitz' claim, as follows:

> Registrant's claim for exemption is predicated upon his status as a student of the Rabbinical Seminary of America. That institution is one of several talmudical academies in this area offering courses based upon intensive study of the talmudical tractates, commentaries and codes. While these courses embrace the subject matter upon which candidates for traditional rabbinic certification are examined, students taking such courses are not necessarily preparing for the ministry.
>
> Orthodox tradition has always encouraged advanced study of talmudic literature, both privately and at academies instituted for that purpose, irrespective of the specific occupational objective of those engaged in such study, and all courses offered by these academies are open to qualified students without regard to the individual student's specific intention to prepare for a career of service in the rabbinate.
>
> Thus, a student ultimately intending to enter business or a profession, or some non-rabbinic activity in the field of religion, may be enrolled in the same courses attended by other students who are specifically concerned with preparation for the rabbinate. It is, therefore, essential for

purposes of Selective Service classification to determine in each individual case the purpose which the registrant has in mind in pursuing his course of study.

* * * * *

Accordingly, this panel is of the opinion that proper evaluation of the registrant's status must take into consideration the character of the institution he is attending and the relevant circumstances present on the record and disclosed at the examination before this panel. Furthermore, in seeking to assess the sincerity of the registrant's declared purpose, due weight must be given to the registrant's manner of answering questions, his demeanor, presence or absence of inadequately explained inconsistencies in his statements, and in general, the total impression accruing relevant to registrant's candor, trustworthiness and integrity.

In the present case the registrant described himself in his questionnaire (subscribed January 24, 1941) as a teacher, cantor and student preparing for psychiatric social work. In the four page statement filed with his questionnaire, registrant gives no indication whatever that he plans to prepare for the ministry, but on the contrary, refers in very emphatic terms to his "looking forward to making a success of my career—a career dedicated to social service." He also refers to his anxiety that "I will lose all my contacts which are so necessary to make me a successful cantor" and

to the fear that "if you take me now, you practically negate my possibilities to attain the position I seek in life, namely, a psychiatric social worker." In subsequent statements submitted to the local board and in his examination before this panel, registrant represents that he is a student preparing for the orthodox rabbinate, that he had decided on that career as early as 1939, and that for some four years prior to that date he had planned to prepare for a career in the conservative rabbinate.

In view of his declared aspirations as of January, 1941, and the many inconsistencies in his explanation of the reasons for the omission at that time of any reference to his ministerial ambitions, and the rather indifferent and unsystematic manner in which he sought to prepare himself for his subsequently professed objective, this panel is not convinced that his formal entry upon a course of study in the Rabbinical Seminary of America in September, 1941, and his continued attendance at that institution since that date was prompted by a sincere intention to prepare for a career in the rabbinate. On the contrary, an analysis of the history of his case taken together with an appraisal of the registrant's reliability and candor, as disclosed by our examination, impels the conclusion that registrant's attendance at the seminary has been motivated by the desire to secure a basis for

exemption from training and service under Selective Service law.

The local board classified Horowitz I–A on May 11, 1944, and he was thereafter, at his request, given a hearing before the local board. As a result of the hearing the local board referred Horowitz's selective service file to Rabbi Henry A. Schorr, who formerly had been chairman of another local board in New York City, for an advisory recommendation. Rabbi Schorr recommended that Horowitz be classified IV–D, and the local board did so on June 1, 1944.

On August 10, 1944, the local board held a hearing concerning Horowitz' case "to refresh our records and inquire into your present status," and as a result, Horowitz was again classified I–A. He thereafter requested and was accorded another hearing before the local board at which he submitted additional documentary evidence in support of his claim to a IV–D classification. The board considered the new evidence, but concluded that it did not merit a change in classification. Horowitz appealed to the board of appeal, which on November 14, 1944, classified him I–A by a vote of 5 to 0. On two occasions thereafter Horowitz requested the local board to reopen his classification and he submitted additional evidence in support of his claim. The local board examined the new evidence, but on both occasions it concluded that the additional evidence did not warrant reopening the classification.

On February 12, 1945, New York City Headquarters wrote to the appeal board as follows:[4]

> On November 14, 1944, your Board classified the above named registrant in Class I–A by a vote of 5–0, and the registrant is now scheduled to report for induction on February 15th.
>
> The file in this case contains a communication from this Headquarters, dated May 10, 1944, reporting to the Local Board the recommendation of our Advisory Panel on Theological Classifications, after hearing in the matter, that registrant's status does not warrant a IV–D classification.
>
> For your information, it is stated that the following members of the Advisory Panel were present at the hearing in this case and joined in the recommendation:
>
> Hon. Jonah J. Goldstein, Judge of the Court of General Sessions in New York County; Member of the Board of Directors of the Jewish Education Committee; Trustee at large of the Federation of Jewish Charities; and formerly a member of the Administrative Committee of the Zionist Organization of America.
>
> Hon. William S. Evans, Justice of the City Court of the City of New York; Member of the Jewish Education Committee; Member of the B'Nai Brith; and Member of Federation for Support of Jewish Philanthropic Societies.

[4] A similar letter was sent to the local board.

Hon. E. Ivan Rubenstein, Justice of the Supreme Court of the State of New York; Member of the United Synagogue of America; Past President and Member of the Board of Trustees of Temple Beth El, Manhattan Beach; and Member of the Continuing Conference of the Jewish Theological Seminary of America.

While none of the panel's rabbinical members were present at the hearing in question, this Headquarters is of the opinion that the members who attended were fully qualified to pass upon the issues presented.

However, if the Board of Appeal, or any member thereof, considers the information with regard to the identity of the panel members voting in the present case as warranting reconsideration of the registrant's classification by your Board, it is requested that this Headquarters be advised accordingly, in order that appropriate administrative action may be taken at this time to secure such reconsideration.

Both the local board and the appeal board advised City Headquarters that there was no occasion for reopening the classification. The board of appeal, which had finally classified Horowitz, stated that the board had considered the information concerning the panel's membership and that "we have once again unanimously agreed that the registrant's status does not warrant a IV–D classification."

Respondent was inducted into the armed forces on February 15, 1945.

Samuels.—This respondent registered with local board No. 193, Brooklyn, New York, on February 16, 1942, and on July 23, 1942, he filed his selective service questionnaire. In that document he stated that he was 21 years of age and that he had had two years of high school education; that he was a student at the Mesifta Theological Seminary, preparing for the rabbinate; and that since 1940 his regular occupation was that of "general clerk" in a store. In an occupational questionnaire, Samuels stated that he was employed by the Eden Textile Company and that for the past two years his duties were to "receive, ship, check, stock, and sell cotton goods." He also stated in that document that the job for which he was best fitted was that of a "Hebrew school teacher and spiritual leader."

In response to an inquiry from the local board, the registrar of the Mesifta Talmudical Seminary advised the board that Samuels "entered our Rabbinical Division in September 1937 and will probably graduate in 1945"; "Mr. Samuels has been attending our school system since the age of six. He graduated from our 8 year elementary course and from our 4 year pre-rabbinical course. Upon his completion of the latter division he was admitted to our Rabbinical division in September 1937. After having attended for two years he left the school in

June 1939 to seek employment.[5] In September 1941 he returned to our evening division and in July 1942[6] he was transferred to the day session." On August 29, 1942, Samuels was classified IV–D.

In May 1944, Samuels was given a physical examination and was found acceptable for general military service. Thereafter, on June 21, 1944, he had a hearing before the Advisory Panel of Theological Classifications on his claim to classification as a student preparing for the ministry. The stenographic transcript of the hearing shows that Samuels stated to the panel, *inter alia*, that he expected to graduate from the seminary in 1945; that he left school in October 1939 because of ill health, but that in January 1940 he took a job as a stock clerk; that he worked in this capacity until July 1942; that at that time he returned to the school as a full-time student, even though the school summer vacation period started on July 15; and that he became a full-time student at about the time he filed his selective service questionnaire.

The Theological Panel prepared a "Statement for the Record," as in the *Horowitz* case, in which

[5] More than two years later, at a time when Samuels' classification was under consideration, the registrar of the Seminary advised the local board that he had been mistaken in stating that Samuels left school in 1939 "to seek employment"; that, instead, he left school because of ill health.

[6] It was in July 1942, that Samuels received his selective service questionnaire from the local board.

it concluded that Samuels was not "preparing in good faith for a career of service in the practicing rabbinate." The transcript of the hearing, together with the Panel's statement and recommendation, were then forwarded to the local board with the admonition that, "while the Local Board should give careful consideration to the recommendation of the advisory panel, the responsibility of determining the registrant's classification must rest with the Local Board itself, or the appropriate agency of appeal."

The local board reclassified Samuels from IV–D to I–A on August 22, 1944. He thereafter submitted additional evidence and requested a hearing before the local board, which he had on September 26, 1944. He had a second hearing on October 4, 1944, at which he submitted more evidence in support of his claim. The stenographic transcript of the second local board hearing reveals that Samuels claimed that the transcript of the hearing before the theological panel was inaccurate; that the local board permitted him to correct the alleged inaccuracies; and that at the conclusion of the hearing the local board advised him that "the Board will give your case every consideration and we are not bound by the questions put to you by the Panel. We are considering the facts as they are now before us and will consider also the deposition submitted to us by the Panel together with the additional information you have given us." On

October 5, 1944, the local board ordered that Samuels be continued in I–A, and on his appeal to his board of appeal, he was again classified I–A.[1]

A few days after the decision of the board of appeal, Samuels filed additional supporting documents with the local board and requested that his classification be reopened. The associate government appeal agent thereupon examined Samuels' file, including the newly submitted evidence, and he advised the local board that "I fail to find anything in the record that would justify reopening of the case or disturbing the I–A classification." The local board again held a hearing on Samuels' claim, at which he was present. At the hearing, Samuels was advised that the additional evidence which he had submitted was merely corroborative and did not of itself justify reopening the classification. One of the members of the local board stated to Samuels that he had investigated his claim that the theological panel had acted hastily and that he had learned that the members of the panel "are qualified men, well versed in the field that the registrant was being interviewed about." Samuels advised the local board that of his own volition he had appeared before a committee (not connected with the selective service system) rep-

[1] On the appeal, there was included in Samuels' file his "Statement on Appeal", in which he summarized his reasons for urging the board of appeal to upset the classification given him by his local board.

resenting the Union of Orthodox Rabbis and that the committee concluded that he was a student preparing in good faith for the ministry.' One member of the local board noted for the file that he was not persuaded by Samuels' evidence and that "registrant's demeanor was not favorable." On November 14, 1944, the request to reopen the classification was denied, and on December 9 Samuels was ordered to report for induction on December 20, 1944. His subsequent request for a six months' deferment was denied, and he was inducted into the Army on December 26, 1944.

SPECIFICATION OF ERRORS TO BE URGED

The circuit court of appeals erred:

1. In holding that "the interjection of the statement and recommendation of the 'advisory panel' into the proceedings of the local boards vitiated those proceedings and rendered the relators' reclassification and induction invalid."

2. In reversing the judgments of the district court and ordering respondents discharged from military custody.

REASONS FOR GRANTING THE WRIT

The circuit court of appeals, in our view, has incorrectly decided a question of substantial importance in the administration of the Selective Training and Service Act, concerning which there

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[1] It does not appear whether the committee had before it the same facts as were before the selective service boards and the theological panel.

exists a conflict among the circuit courts of appeals and the federal district courts.

Section 5 (d) of the Selective Training and Service Act (*infra*, p. 29) exempts from military service registrants who are "regular or duly ordained ministers of religion" and "students who are preparing for the ministry in theological or divinity schools recognized as such for more than one year prior to" September 16, 1940. And Section 10 (a) (2) confers on the local boards established within the Selective Service System the "power within their respective jurisdictions to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this Act of all individuals within the jurisdiction of such local boards."

The question which the cases present is whether a selective service board abdicates its function under Section 10 (a) (2) of the Act where it refers a registrant's claim to a IV–D classification to an advisory panel on theological classifications and considers the recommendation of that panel as evidence, together with all the other evidence in the registrant's file, in classifying him.

1. *The Function of the Advisory Panel on Theological Classifications in the Selective Service System.*—We are advised by the Selective Service System that the State Director of Selective Service for New York City established in January 1943

a panel of prominent laymen and rabbis[9] of the Jewish faith to assist the local boards in that area in investigating claims by registrants to classification in IV–D as ministers or students preparing for the ministry and in evaluating the technical theological data involved.[10] In essence, the panel was created to perform in the field of theological classifications the same function which the Hearing Officer of the Department of Justice performs in cases of conscientious objectors (see Sec. 5 (g), *infra*, pp. 29–30), i. e., to investigate the registrant's claim, interview him, analyze the significant facts pertaining to the claim, and to make an advisory recommendation to the selective service boards concerning the merits of the claim. Among the cases arising which prompted the creation of the panel were those involving the question whether the registrant was in fact "preparing for the ministry" at the institution he was attending.[11]

[9] The members of the panel are uncompensated members of the Selective Service System, each of whom has taken an oath of office as required by Section 602.4 of the Selective Service Regulations (*infra*, p. 31).

[10] Similar groups were later established for certain other faiths.

[11] Attendance at a theological school, in many instances, is not limited to students who are preparing for the ministry. For example, students preparing to be teachers in Hebrew Schools very often attend theological seminaries for their educational training. See *United States ex rel. Goodman v. Hearn*, No. 11456, C. C. A. 5, decided January 15, 1946.

In practice, the panel functions in the manner shown by the records in these cases. After a registrant who claims a IV-D classification has submitted his evidence to the local board, the file is referred to the panel for an advisory recommendation if any question exists as to the merits of his claim. It may be referred to the panel by the local board or at the request of the City Director of Selective Service. The registrant is given a hearing before the panel, at which he is permitted to furnish additional evidence and to explain the basis for his claim to exemption. A stenographic transcript is made of the hearing and that transcript, together with a recommendation of the panel, is made a part of the registrant's selective service file. The local board is specifically advised in each case that the recommendation is advisory only and that it is the function of the local board to classify the registrant.

2. *The Question is Important and There is a Conflict of Decisions.*—a. The same question which is involved in the present cases was decided against the registrant in *United States ex rel. Goodman* v. *Hearn*, No. 11456, decided January 15, 1946, by the Circuit Court of Appeals for the Fifth Circuit. As in these cases, it was contended in the *Goodman* case that the local board abdicated its functions by considering the advisory recommendation of the panel on theological classifications. And, again, as in these cases, the

contention was predicated upon the decision of the Circuit Court of Appeals for the Second Circuit in *United States ex rel. Levy* v. *Cain*, 149 F. 2d 338, where a registrant was ordered discharged from the Army because his classification was founded upon the recommendation of the advisory panel.[12] In an opinion by Judge Sibley, the Circuit Court of Appeals for the Fifth Circuit expressly disagreed with the decision below and with the decision of the Circuit Court of Appeals for the Second Circuit in the *Levy* case. The court carefully examined the considerations underlying the use of the theological panel and concluded that the mere fact that the local board considered the recommendation of the theological panel did not vitiate the registrant's classification. In rejecting the view of the court below, the Circuit Court of Appeals for the Fifth Circuit said:

> Appellant rests heavily on *United States ex rel. Levy* v. *Cain*, 149 F. (2) 338, in the Second Circuit, followed in the Third Circuit in *United States ex rel. Samuels vs. Pearson*, — Fed. —, and *United States*

[12] Compare *United States ex rel. Trainin* v. *Cain*, 144 F. 2d 944 (C. C. A. 2), certiorari denied, 323 U. S. 795. The registrant in that case contended, in the circuit court of appeals and upon petition for a writ of certiorari, that his classification was illegal because the local board considered the recommendation of the advisory panel. The circuit court of appeals flatly rejected the contention, and certiorari was denied. The subsequent ruling of the same court in the *Levy* case qualifies the earlier decision in the *Trainin* case.

ex rel. Horowitz v. *Pearson*, — Fed. (2) —, in which on habeas corpus the use by the local boards of the Theological Panel above mentioned was held to vitiate the classifications made. We do not agree with all that was said in these opinions. This Theological Panel, not authorized by statute or regulation, seems to have been set up by Selective Service Headquarters for New York City, to give the local boards of the vicinity information and advice on the matter of these ministerial exemptions, there being many kinds of religions and ministers and students in that crowded population with which members of the local boards might not be familiar. We can see that such advice from well-informed members of the faiths in question might both help and speed just classification; and such was, we think, its purpose in this case. * * *

* * * * * *

It is not according to general court practice to take and consider opinions of outsiders on the question at issue, and there is danger that too much weight may be given to them. But even in courts the practice is not unknown. * * * We do not think that a Local Board necessarily abdicates its function or vitiates its decisions on deferments and exemptions by seeking opinions which it regards as reliable. It must, of course, as this Local Board was advised, make the final decision, and fairness and the regulations require that such

outside information be put in writing in the file where the registrant may see and explain or deny it. That was all done in this case. The names of the panel members were not in the file, but in each instance two were known to registrant and all could have been learned easily. The Board wrote registrant that it had made its own classification on the hearing before it. There is no good ground for saying it left the decision to the panel.

The same conflict of decisions exists in the federal district courts. Compare *United States ex rel. Rubin* v. *Magruder*, 55 F. Supp. 947 (D. R. I.), in which the court held, *inter alia*, that the selective service board was improperly influenced by the panel's recommendation, with *United States ex rel. Isserоff* v. *Cain*, 57 F. Supp. 715 (E. D. N. Y.), *United States ex rel. Steinberg* v. *Graham*, 57 F. Supp. 938 (E. D. Ark.), *United States ex rel. Goodstein* v. *Mallon*, 61 F. Supp. 671 (D. Md.), and *United States ex rel. Yaroslawitz* v. *Fales*, 61 F. Supp. 960 (S. D. Fla.), where the courts sustained selective service classifications based in part upon recommendations of the panel. See also note 12, *supra*, p. 22.

b. We think that the decision of the Circuit Court of Appeals for the Fifth Circuit in the *Goodman* case represents the sounder view. As that court said, "We do not think that a Local Board necessarily abdicates its function or vitiates its decisions on deferments and exemptions by

seeking opinions which it regards as reliable. It must, of course, as this Local Board was advised, make the final decision, and fairness and the regulations require that such outside information be put in writing in the file where the registrant may see and explain or deny it."

Neither the Selective Training and Service Act nor the Selective Service Regulations (see Sec. 623.2, *infra*, pp. 32–33) place limits on the sources from which the local boards may seek information as a basis for classifying a registrant. So long as the information is relevant to the inquiry and is placed in the file where the registrant may examine it and reply to it, we think it is immaterial whether the information comes from the registrant, local board investigators, or, as in these cases, from an expert advisory body established within the Selective Service System. In habeas corpus cases such as these, we believe the registrant must show more than that the local board considered the recommendation of the advisory panel or that the recommendation did not satisfy the limitations imposed by the *Levy* decision.[13] He bears the burden of establishing that the local board did not consider all the evidence before it in making its classification; that, in fact, the local board abdicated its responsibilities by blindly ac-

[13] The *Levy* decision did not purport to ban all use of the advisory panel, but limited its use in two respects: "The personnel of the 'panel' must be disclosed to the registrant so that he may effectively challenge it; and the answers must be limited to ecclesiastical questions" (149 F. 2d at 341).

cepting the recommendation of the theological panel as the basis for classification.

In neither the *Horowitz* nor the *Samuels* case does the local board file reveal anything of this character. To the contrary, the files show that every item of evidence which respondents offered was received by the selective service boards and considered by them; that the boards accepted the recommendations of the theological panel as advisory only; that respondents had access to the recommendations and had full opportunity to challenge them and to adduce additional evidence refuting the panel's recommendations; and that there is evidence which supports the selective service boards' rejection of respondents' claims to classification in IV–D. Nothing in the files, or in the evidence adduced by respondents at the habeas corpus hearings, permits the conclusion that the selective service boards departed either from the Selective Training and Service Act or the Selective Service Regulations in classifying respondents.

c. The question involved in these cases is of substantial importance in the administration of the Selective Training and Service Act. For the problem affects not only the future classification of registrants, but it also affects the validity of the classifications of hundreds of registrants who are now in the armed forces and who might be entitled to release on habeas corpus if the doctrine of the court below is correct. Throughout the war

it has been the practice of the selective service boards to seek advisory recommendations from experts on questions concerning which the local boards desire advice. Thus, for example, in determining whether a physician is essential to the community and should be deferred, the boards have uniformly sought a recommendation from representatives of the local medical association. In determining whether registrants should be deferred as essential farm workers, the boards have sought the recommendations of the local County War Boards established by the Department of Agriculture, concerning the registrants' agricultural activities and the necessity of deferring them.[14] In dealing with individual claims to classification in IV–D the boards, as in *Horowitz'* case, have called in a minister of religion of the particular faith involved to advise the board concerning the religious aspects of the case. Numerous similar situations exist in which advisory recommendations, like these in the present cases, were considered by the selective boards. If the decision below is correct, a serious doubt will have been cast on the validity of the selective service classifications of many men who were so classified and who have been inducted and are presently serving in the armed forces.

[14] That this practice is permissible has been twice recognized by the Circuit Court of Appeals for the Ninth Circuit in decisions which, in principle, thus conflict with the decision below. *Sullivan* v. *Swatzka*, 148 F. 2d 965, certiorari denied October 15, 1945; *Cramer* v. *France*, 148 F. 2d 801.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for writs of certiorari should be granted.

J. HOWARD MCGRATH,
Solicitor General.

MARCH 1946.

APPENDIX

The Selective Training and Service Act of 1940 (54 Stat. 885, 50 U. S. C. App. 301, et seq.) provides, in part, as follows:

> SEC. 5. * * * (d) Regular or duly ordained ministers of religion, and students who are preparing for the ministry in theological or divinity schools recognized as such for more than one year prior to the date of enactment of this Act, shall be exempt from training and service (but not from registration) under this Act.
>
> * * * * * *
>
> (g) * * * Any such person claiming such exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board provided for in section 10 (a) (2). Upon the filing of such appeal with the appeal board, the appeal board shall forthwith refer the matter to the Department of Justice for inquiry and hearing by the Department or the proper agency thereof. After appropriate inquiry by such agency, a hearing shall be held by the Department of Justice with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board (1) that if the objector is inducted into the land or naval forces under

this Act, he shall be assigned to noncombatant service as defined by the President, or (2) that if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be assigned to work of national importance under civilian direction. If after such hearing the Department finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall give consideration to but shall not be bound to follow the recommendation of the Department of Justice together with the record on appeal from the local board in making its decision. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors.

* * * * * *

SEC. 10. * * * (b) The President is further authorized, under such rules and regulations as he may prescribe, to delegate and provide for the delegation of any authority vested in him under this Act to such officers, agents, or persons as he may designate or appoint for such purpose or as may be designated or appointed for such purpose pursuant to such rules and regulations as he may prescribe.

(c) In the administration of this Act voluntary services may be accepted. * * *

The Selective Service Regulations provide:

602.2 *Voluntary services.* Voluntary services in the administration of the selective service law may be accepted and should be encouraged.

602.3 *Uncompensated services.* The services of registrars, members of local boards, members of boards of appeal, members of medical advisory boards, members and associate members of advisory boards for registrants, government appeal agents and associate government appeal agents, examining physicians and examining dentists, reemployment committeemen, interpreters, and all other persons volunteering their services to assist in the administration of the selective service law shall be uncompensated, and no such person shall accept remuneration from any source for services rendered in connection with selective service matters.

602.4 *Oath of Office and Waiver of Pay or Compensation (Form 21).* (a) Every person who undertakes to render voluntary uncompensated service in the administration of the selective service law shall, before he enters upon his duties, execute an Oath of Office and Waiver of Pay or Compensation (Form 21).

(b) Every person who undertakes to render compensated service in the administration of the selective service law shall, before he enters upon his duties, execute the Oath of Office portion of Form 21, but shall not execute the Waiver of Pay or Compensation portion of Form 21.

(c) When executed in the manner herebefore provided, the Oath of Office and Waiver of Pay or Compensation (Form 21) shall be sent to the State Director of Selective Service for filing.

* * * * *

622.44 *Class IV–D: Minister of religion or divinity student.*

(a) In Class IV–D shall be placed any registrant who is a regular or duly or-

dained minister of religion or who is a student preparing for the ministry in a theological or divinity school which has been recognized as such for more than 1 year prior to the date of enactment of the Selective Training and Service Act (September 16, 1940).

(b) A "regular minister of religion" is a man who customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization of which he is a member, without having been formally ordained as a minister of religion; and who is recognized by such church, sect, or organization as a minister.

(c) A "duly ordained minister of religion" is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who customarily performs those duties.

623.2 *Information considered for classification.* The registrant's classification shall be made solely on the basis of the official forms of the Selective Service System and such other written information as may be contained in his file; provided, that the local board shall proceed with the registrant's classification and classify him whenever (1) he has failed or hereafter fails to return his Selection Service Questionnaire (Form 40) within the time allowed by section 621.2, or (2) he has been separated from the land or naval forces of the United States and the local board determines that he may be classified properly without requiring him to complete and return a Se-

lective Service Questionnaire (Form 40), or (3) he has failed or hereafter fails to provide the local board with any other information concerning his status which he is requested or required to furnish. Oral information should not be considered unless it is summarized in writing and the summary placed in the registrant's file. Under no circumstances should the local board rely upon information received by a member personally unless such information is reduced to writing and placed in the registrant's file.

626.1 *Classification not permanent.* (a) No classification is permanent.

(b) Each classified registrant and each person who has filed a request for the registrant's deferment shall, within 10 days after it occurs, report to the local board in writing any fact that might result in the registrant being placed in a different classification. Any other person should, within 10 days after knowledge thereof, report to the local board in writing any such fact.

(c) The local board shall keep informed of the status of classified registrants. Registrants may be questioned or physically or mentally reexamined, employers may be required to furnish information, police officials or other agencies may be requested to make investigations, and other steps may be taken by the local board to keep currently informed concerning the status of classified registrants.

626.2–1 *When registrant's classification shall be reopened and considered anew.* The local board shall reopen and consider anew the classification of a registrant upon the written request of the State Director of Selective Service or the Director of Selec-

tive Service and upon receipt of such request shall immediately cancel any Order to Report for Induction (Form 150) or any Order to Report for Work of National Importance (Form 50) which may have been issued to the registrant; provided that after a registrant has left the local board for delivery pursuant to an Order to Report for Work of National Importance (Form 50), the local board shall reopen and consider anew the classification of such registrant only upon the written request of the Director of Selective Service.

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Nos. 58 and 59

In the Supreme Court of the United States

OCTOBER TERM, 1946

GENERAL LELAND S. HOBBS, POST COMMANDING OFFICER, FORT DIX, NEW JERSEY, PETITIONER

v.

UNITED STATES EX REL. HARRY HOROWITZ

GENERAL LELAND S. HOBBS, POST COMMANDING OFFICER, FORT DIX, NEW JERSEY, PETITIONER

v.

UNITED STATES EX REL. JACOB S. SAMUELS

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

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OPINION BELOW

The opinion of the Circuit Court of Appeals for the Third Circuit (No. 58, R. 47–48; No. 59, R. 67–68) is reported at 151 F. 2d 801. The findings of fact and conclusions of law in the *Horowitz* case, No. 58, appear at R. 37–39. The opin-

ion of the district court in the *Samuels* case, No. 59, appears at R. 55–58.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered November 15, 1945 (No. 58, R. 51; No. 59, R. 68). On February 12, 1946, Mr. Justice Burton extended the time for filing a petition for writs of certiorari for thirty days from February 15, 1946 (No. 58, R. 51; No. 59, R. 69). The petition for writs of certiorari was filed on March 13, 1946, and granted on May 27, 1946 (No. 58, R. 52; No. 59, R. 70). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, in each case, it was proper for the local board to reopen the registrant's classification and to consider the advisory recommendation of a panel on theological classifications, and whether it was thereafter proper for the boards of appeal to consider these recommendations together with all the other evidence in respondents' selective service files in classifying them.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Selective Training and Service Act are set forth in Appendix A, *infra*, pp. 48–53. The Selective Service Regulations, in pertinent part, are set forth in Appendix B, *infra*, pp. 54–66.

STATEMENT

Each respondent registered under the Selective Training and Service Act and thereafter claimed exemption from military service as a bona fide student in a recognized theological school preparing himself to be a rabbi in the Jewish religion. Their claims were ultimately rejected and each was classified I–A and inducted into the Army. Shortly thereafter separate petitions for writs of habeas corpus were filed on their behalf in the United States District Court for the District of New Jersey seeking their release from military custody on the ground that their local boards had arbitrarily and capriciously denied them classification in IV–D as students preparing for the ministry (No. 58, R. 3–7; No. 59, R. 2–4). Petitioner's predecessor[1] filed a return (No. 58, R. 8; No. 59, R. 5) in each case and hearings were had in which the selective service file of each respondent was received in evidence (No. 58, R. 14–15; No. 59, R. 5, 17). Thereafter the court found against respondents and ordered the writs of habeas corpus dismissed (No. 58, R. 37–39; No. 59, R. 55–59).

Each respondent took an appeal to the Circuit Court of Appeals for the Third Circuit and that court reversed the judgments of the district court and ordered respondents released from military

[1] Petitioner was duly substituted for the officer who preceded him in command of Fort Dix (Journal, U. S. Sup. Ct., October Term, 1945, p. 255, Nos. 947 and 948).

custody. Relying on *United States ex rel. Levy v. Cain*, 149 F. 2d 338 (C. C. A. 2), the court below held, in a single *per curiam* opinion, that it was improper for the selective service boards to consider the statements and recommendations of the advisory panel on theological questions established by the Selective Service System to the effect that respondents were not bona fide students preparing for the ministry.

The pertinent facts relating to respondents' selective service classifications, as revealed by their respective selective service files, which are before the Court as original exhibits, may be summarized as follows:

Horowitz.—Respondent registered under the Act and in January 1941 filed his questionnaire and an accompanying statement in which he said that he was a student at the College of the City of New York preparing for a career as a psychiatric social worker,[2] and that if he was selected for induction he desired his induction to be postponed until the close of the 1941 academic year. In this statement he said, in part:

> * * * My request is that you defer my drafting until February, 1943. At that time I will have been graduated from college. I will have been able to save enough money for graduate work and some to spare to tide me over after my year of

[2] The college authorities advised the local board that Horowitz was in "substantially full time attendance" at the college.

service. I would have had time to become a known cantor who could spare a year's absence. And when I returned, I would be able to seek employment in my field with a bachelor's degree in my pocket—employment which I could not expect without the diploma. In other words if you take me now, you practically negate my possibilities to attain the position I seek in life, namely, a psychiatric social worker.

* * * * *

As a dejected person, I could be of little value to an army, but as a grateful person two years later, I would come willingly with blessings on my lips and in my heart for the justice which had been meted out to me.

* * * * *

On May 10, 1941, Horowitz was physically examined and found qualified for general military service. Less than two weeks later the local board was advised that Horowitz had been enrolled in the Rabbinical Seminary of America, a school listed by the Selective Service System as a theological school which has been recognized as such for more than one year prior to September 16, 1940, for the scholastic term beginning in September 1941.

On July 1, 1941, the academic year at City College having ended, Horowitz was classified I–A, and on his appeal to the board of appeal he was again classified I–A on August 25, 1941. In the meantime he had claimed classification as a student preparing for the ministry, and he

undertook to supply the local board with additional evidence to support this claim. In an affidavit dated July 16, 1941, Horowitz stated, *inter alia*, that before May 1941, he "had not disclosed my intention to become a rabbi because I had no concrete facts to present; I had merely hopes." On November 2, 1941, Horowitz was classified IV–D by the local board, and he retained this classification until May 1944.[3]

In April 1944, the Director of Selective Service for New York City undertook a review of Horowitz' selective service file[4] and in the course of that review Horowitz was requested to appear be-

[3] On June 12, 1942, relator filed his Selective Service Occupational Questionnaire in which he stated that he was taking a course in rabbinical studies at the Rabbinical Seminary of America, which he expected to complete in 1947 or 1948; and that he was taking a course in Bachelor of Social Science at the College of the City of New York which he expected to complete in June 1944. Relator stated that the job for which he was best fitted was Group Worker for Children, and that he had four years experience in such work. Under "duties of job for which you are best fitted" he stated: "I have supervised as a volunteer worker children's clubs and have served as a leader of an individual club as well as director of all." Under "job for which you are next best fitted" he stated "None." He stated that his present job was that of student and under Professional and Scientific Workers he listed himself as a Social worker.

[4] As we show below, *infra*, pp. 23–25, the Director is authorized by the Selective Service Regulations to require a local board to reopen a classification and he is authorized to take an appeal from a local board classification. Evidently, the Director undertook a review of Horowitz' file to determine whether to take either of these steps.

fore the advisory panel on theological classifications (see *infra*, pp. 23–30). A hearing was had before the panel on May 2, 1944, at which Horowitz furnished additional evidence and full inquiry was made into his claim that he was a bona fide student preparing for the ministry. A transcript of this hearing was made and was sent to the local board on May 10, 1944. The letter transmitting the transcript, signed by the Chief, Legal Division, New York City Headquarters, advised the local board that:

> There is returned herewith the cover sheet and file of the above named registrant submitted to this Headquarters for administrative review.
>
> On May 2nd the registrant appeared before the appropriate division of our advisory panel on theological classifications, composed of eminent clergymen and laymen. After reviewing the file and examining the registrant, and upon consideration of all the circumstances, the panel voted to recommend that registrant's status does not warrant his classification in Class IV–D. A transcript of the evidence taken at the hearing is enclosed herewith.
>
> It is requested, therefore, that the Local Board reopen and reconsider the registrant's classification of Dec. 2nd, 1943 in the light of the additional evidence presented and advise this Headquarters of the action taken in the matter.

> Of course, while the Local Board should give careful consideration to the recommendation of the advisory panel, formal determination of the registrant's classification must rest with the Board itself or the appropriate appeal agency.

Shortly thereafter there was also forwarded to the local board a statement for the record, dated May 2, 1944, which had been prepared by the advisory panel. The local board was directed that "The statement should be added to the registrant's file and considered together with the other information of record in determining the registrant's classification." The panel's statement contained a general discussion of educational practices in the field of Jewish education and it spelled out the considerations which the panel regarded as significant in considering Horowitz' claim, as follows:

> Registrant's claim for exemption is predicated upon his status as a student of the Rabbinical Seminary of America. That institution is one of several talmudical academies in this area offering courses based upon intensive study of the talmudical tractates, commentaries and codes. While these courses embrace the subject matter upon which candidates for traditional rabbinic certification are examined, students taking such courses are not necessarily preparing for the ministry.

Orthodox tradition has always encouraged advanced study of talmudic literature, both privately and at academies instituted for that purpose, irrespective of the specific occupational objective of those engaged in such study, and all courses offered by these academies are open to qualified students without regard to the individual student's specific intention to prepare for a career of service in the rabbinate.

Thus, a student ultimately intending to enter business or a profession, or some non-rabbinic activity in the field of religion, may be enrolled in the same courses attended by other students who are specifically concerned with preparation for the rabbinate. It is, therefore, essential for purposes of Selective Service classification to determine in each individual case the purpose which the registrant has in mind in pursuing his course of study.

* * * * *

Accordingly, this panel is of the opinion that proper evaluation of the registrant's status must take into consideration the character of the institution he is attending and the relevant circumstances present on the record and disclosed at the examination before this panel. Furthermore, in seeking to assess the sincerity of the registrant's declared purpose, due weight must be given to the registrant's manner of answering questions, his demeanor, presence or absence of inadequately explained inconsistencies in his statements, and in

general, the total impression accruing relevant to registrant's candor, trustworthiness and integrity.

In the present case the registrant described himself in his questionnaire (subscribed January 24, 1941) as a teacher, cantor and student preparing for psychiatric social work. In the four page statement filed with his questionnaire, registrant gives no indication whatever that he plans to prepare for the ministry, but on the contrary, refers in very emphatic terms to his "looking forward to making a success of my career—a career dedicated to social service." He also refers to his anxiety that "I will lose all my contacts which are so necessary to make me a successful cantor" and to the fear that "if you take me now, you practically negate my possibilities to attain the position I seek in life, namely, a psychiatric social worker." In subsequent statements submitted to the local board and in his examination before this panel, registrant represents that he is a student preparing for the orthodox rabbinate, that he had decided on that career as early as 1939, and that for some four years prior to that date he had planned to prepare for a career in the conservative rabbinate.

In view of his declared aspirations as of January, 1941, and the many inconsistencies in his explanation of the reasons for the omission at that time of any reference to his ministerial ambitions, and the rather

> indifferent and unsystematic manner in which he sought to prepare himself for his subsequently professed objective, this panel is not convinced that his formal entry upon a course of study in the Rabbinical Seminary of America in September, 1941, and his continued attendance at that institution since that date was prompted by a sincere intention to prepare for a career in the rabbinate. On the contrary, an analysis of the history of his case taken together with an appraisal of the registrant's reliability and candor, as disclosed by our examination, impels the conclusion that registrant's attendance at the seminary has been motivated by the desire to secure a basis for exemption from training and service under the Selective Service law.

Pursuant to the request of the city director's office the local board reopened Horowitz' classification, considered the new information, and on May 11, 1944, classified him I–A. He was thereafter, at his request, given a hearing before the local board. As a result of the hearing the local board referred Horowitz's selective service file to Rabbi Henry A. Schorr, who formerly had been chairman of another local board in New York City, for another advisory recommendation. Rabbi Schorr recommended that Horowitz be classified IV–D (see also, No. 58, R. 15–21) and the local board did so on June 1, 1944.

On August 10, 1944, the local board held a hearing concerning Horowitz' case "to refresh

our records and inquire into your present status," and as a result, Horowitz was again classified I–A. He thereafter requested and was accorded another hearing before the local board at which he submitted additional documentary evidence in support of his claim to a IV–D classification. The board considered the new evidence, but concluded that it did not merit a change in classification. Horowitz appealed to the board of appeal, which on November 14, 1944, classified him I–A by a vote of 5 to 0. On two occasions thereafter Horowitz requested the local board to reopen his classification and he submitted additional evidence in support of his claim. The local board examined the new evidence, but on both occasions it concluded that the additional evidence did not warrant reopening the classification.

On February 12, 1945, New York City Headquarters wrote to the appeal board as follows:[6]

> On November 14, 1944, your Board classified the above named registrant in Class I–A by a vote of 5–0, and the registrant is now scheduled to report for induction on February 15th.
>
> The file in this case contains a communication from this Headquarters, dated May 10, 1944, reporting to the Local Board the recommendation of our Advisory Panel on Theological Classifications, after hear-

[6] A similar letter was sent to the local board.

ing in the matter, that registrant's status does not warrant a IV–D classification.

For your information, it is stated that the following members of the Advisory Panel were present at the hearing in this case and joined in the recommendation:

Hon. Jonah J. Goldstein, Judge of the Court of General Sessions in New York County; Member of the Board of Directors of the Jewish Education Committee; Trustee at large of the Federation of Jewish Charities; and formerly a member of the Administrative Committee of the Zionist Organization of America.

Hon. William S. Evans, Justice of the City Court of the City of New York; Member of the Jewish Education Committee; Member of the B'Nai Brith; and Member of Federation for Support of Jewish Philanthropic Societies.

Hon. E. Ivan Rubenstein, Justice of the Supreme Court of the State of New York; Member of the United Synagogue of America; Past President and Member of the Board of Trustees of Temple Beth El, Manhattan Beach; and Member of the Continuing Conference of the Jewish Theological Seminary of America.

While none of the panel's rabbinical members were present at the hearing in question, this Headquarters is of the opinion that the members who attended were fully qualified to pass upon the issues presented.

> However, if the Board of Appeal, or any member thereof, considers the information with regard to the identity of the panel members voting in the present case as warranting reconsideration of the registrant's classification by your Board, it is requested that this Headquarters be advised accordingly, in order that appropriate administrative action may be taken at this time to secure such reconsideration.

Both the local board and the appeal board advised City Headquarters that there was no occasion for reopening the classification. The board of appeal, which had finally classified Horowitz, stated that the board had considered the information concerning the panel's membership and that "we have once again unanimously agreed that the registrant's status does not warrant a IV–D classification."

Respondent was inducted into the armed forces on February 15, 1945.

Samuels.—This respondent registered with local board No. 193, Brooklyn, New York, on February 16, 1942, and on July 23, 1942, he filed his selective service questionnaire. In that document he stated that he was 21 years of age and that he had had two years of high school education; that he was a student at the Mesifta Theological Seminary, preparing for the rabbinate; and that since 1940 his regular occupation was that of "general clerk" in a store. In an occupational questionnaire, Samuels stated that he was employed by

the Eden Textile Company and that for the past two years his duties were to "receive, ship, check, stock, and sell cotton goods." He also stated in that document that the job for which he was best fitted was that of a "Hebrew school teacher and spiritual leader."

In response to an inquiry from the local board, the registrar of the Mesifta Theological Seminary advised the board that Samuels "entered our Rabbinical Division in September 1937 and will probably graduate in 1945"; "Mr. Samuels has been attending our school system since the age of six. He graduated from our 8 year elementary course and from our 4 year pre-rabbinical course. Upon his completion of the latter division he was admitted to our Rabbinical division in September 1937. After having attended for two years he left the school in June 1939 to seek employment.[6] In September 1941 he returned to our evening division and in July 1942[7] he was transferred to the day session." On August 29, 1942, Samuels was classified IV-D.

In May 1944, Samuels was given a physical examination and was found acceptable for gen-

[6] More than two years later, at a time when Samuels' classification was under consideration, the registrar of the Seminary advised the local board that he had been mistaken in stating that Samuels left school in 1939 "to seek employment"; that, instead, he left school because of ill health.

[7] It was in July 1942, that Samuels received his selective service questionnaire from the local board.

eral military service. Thereafter, the director undertook a review of respondent's selective service file and he requested respondent to appear before the Advisory Panel of Theological Classifications in respect to his claim to classification as a student preparing for the ministry. Samuels appeared before the panel on June 21, 1944. The stenographic transcript of the hearing shows that Samuels stated to the panel, *inter alia,* that he expected to graduate from the seminary in 1945; that he left school in October 1939 because of ill health, but that in January 1940 he took a job as a stock clerk; that he worked in this capacity until July 1942; that at that time he returned to the school as a full-time student, even though the school's summer vacation period started on July 15; and that he became a full-time student at about the time he filed his selective service questionnaire.

The Theological Panel prepared a "Statement for the Record," as in the *Horowitz* case, in which it concluded that Samuels was not "preparing in good faith for a career of service in the practicing rabbinate." The director requested the local board to reopen the classification and he forwarded to the local board the transcript of the testimony at the hearing, together with the Panel's statement and recommendation, with the admonition that, "while the Local Board should give careful consideration to the recommendation of the advisory panel, the

responsibility of determining the registrant's classification must rest with the Local Board itself, or the appropriate agency of appeal."

The local board reopened the classification and reclassified Samuels from IV-D to I-A on August 22, 1944. He thereafter submitted additional evidence and requested a hearing before the local board, which he had on September 26, 1944. He had a second hearing on October 4, 1944, at which he submitted more evidence in support of his claim. The stenographic transcript of the second local board hearing reveals that Samuels claimed that the transcript of the hearing before the theological panel was inaccurate; that the local board permitted him to correct the alleged inaccuracies; and that at the conclusion of the hearing the local board advised him that "the Board will give your case every consideration and we are not bound by the questions put to you by the Panel. We are considering the facts as they are now before us and will consider also the deposition submitted to us by the Panel together with the additional information you have given us." On October 5, 1944, the local board ordered that Samuels be continued in I-A, and on his appeal to his board of appeal, he was again classified I-A.[8]

[8] On the appeal, there was included in Samuels' file his "Statement on Appeal," in which he summarized his reasons for urging the board of appeal to upset the classification given him by his local board.

A few days after the decision of the board of appeal, Samuels filed additional supporting documents with the local board and requested that his classification be reopened. The associate government appeal agent thereupon examined Samuels' file, including the newly submitted evidence, and he advised the local board that "I fail to find anything in the record that would justify reopening of the case or disturbing the I–A classification." The local board again held a hearing on Samuels' claim, at which he was present. At the hearing, Samuels was advised that the additional evidence which he had submitted was merely corroborative and did not of itself justify reopening the classification. One of the members of the local board stated to Samuels that he had investigated his claim that the theological panel had acted hastily and that he had learned that the members of the panel "are qualified men, well versed in the field that the registrant was being interviewed about." Samuels advised the local board that of his own volition he had appeared before a committee (not connected with the selective service system) representing the Union of Orthodox Rabbis and that the committee concluded that he was a student preparing in good faith for the ministry.[9] One member of the local board noted for the file that he was not persuaded by Samuels' evidence and

[9] It does not appear whether the committee had before it the same facts as were before the selective service boards and the theological panel.

that "registrant's demeanor was not favorable." On November 14, 1944, the request to reopen the classification was denied, and on December 9 Samuels was ordered to report for induction on December 20, 1944. His subsequent request for a six months' deferment was denied, and he was inducted into the Army on December 26, 1944.

SPECIFICATION OF ERRORS TO BE URGED

The circuit court of appeals erred:

1. In holding that "the interjection of the statement and recommendation of the 'advisory panel' into the proceedings of the local boards vitiated those proceedings and rendered the relators' reclassification and induction invalid."

2. In reversing the judgments of the district court and ordering respondents discharged from military custody.

SUMMARY OF ARGUMENT

The mere fact that respondents' boards of appeal, which made their final classifications, considered the recommendations of the Advisory Panel on Theological Classifications furnishes no basis for judicially invalidating respondents' selective service classifications. The advisory panel performs the same function in the field of theological classifications which the Department of Justice, acting pursuant to Section 5 (g) of the Selective Training and Service Act, performs in the field of conscientious objector classifications. In both instances a hearing is had, at which the

registrant appears and furnishes information concerning the basis of his claim for exemption from military service. In both cases a recommendation for or against exemption from service is furnished the classifying board together with a statement revealing the facts relied upon by the advisory agency and the reasons for the recommendation. And in both situations the classifying board is plainly informed that the recommendation is advisory only and that the board is not bound by it. By providing in Section 5 (g) for the advisory recommendation of the Department of Justice in conscientious objector cases Congress made plain the fact that a classifying board does not abdicate its statutory function by merely considering an advisory recommendation as to whether a registrant should be exempted from military service. In our view, there is no significant distinction between the practice in the conscientious objector cases and the practice in New York City in theological classification cases. Accordingly, we think that the court below misconceived the congressional will when it held that respondents' classifications were void because the classifying boards abdicated their statutory duty by considering the recommendations of the Advisory Panel on Theological Classifications.

The consideration of advisory recommendations by draft boards is not a novel practice. It existed during World War I and was widespread during World War II and the period of mobiliza-

tion which preceded actual hostilities. Rather than prejudicing the registrant, the theological panel affords a real protection to him. For, by virtue of its special competence, the panel is capable of protecting the interests of a registrant having a legitimate claim for exemption, and at the same time it is peculiarly well qualified to detect an unfounded claim to exemption which appears valid to persons not familiar with the religious group with which the registrant is affiliated.

Respondents' argument that they would have been better able to challenge the competence of the panel if informed of the identity of its members who participated in their cases, furnishes no basis for voiding otherwise valid selective service classifications. Each respondent appeared before the panel. If they desired to know the names of the persons before whom they were appearing, they need only have asked. There is no showing that respondents were refused such information or even that they wanted to challenge the competence of the panel, assuming such a challenge might be made. As was held in *United States ex rel. Goodman* v. *Hearn*, 153 F. 2d 186, 189, (C. C. A. 5), writ of certiorari dismissed pursuant to stipulation, a selective service classification is not void merely because a registrant may not have known the identity of the members of the panel. That information is available to any registrant who takes the pains to request it.

ARGUMENT

CONSIDERATION BY THE CLASSIFYING BOARDS OF THE RECOMMENDATIONS OF THE ADVISORY PANEL ON THEOLOGICAL CLASSIFICATIONS FURNISHES NO BASIS FOR INVALIDATING RESPONDENTS' SELECTIVE SERVICE CLASSIFICATIONS

These cases present for determination the questions (1) whether there is legal foundation for the establishment in New York City of an advisory panel on theological classifications, and (2) if so, whether it was proper for the classifying boards to consider the recommendations of the panel that respondents' claims to classification in IV-D should be rejected. Basically, the issue is one of reconciling the power lodged in the local boards by Section 10(a) (2) of the Act, *infra*, pp. 50–51, to hear and determine, "under rules and regulations prescribed by the President," all claims for exemption from military service and the power which, as we shall show, is lodged in the City Director of Selective Service to supervise the work of the local boards, to intervene wherever it appears that a local board's action requires further consideration, and to make available to the boards pertinent information relating to their registrants. Without independently discussing the issue presented by these cases, the court below adopted the decision of the Circuit Court of Appeals for the Second Circuit in *United States ex rel. Levy* v. *Cain*, 149 F. 2d 338, where it was held that a board's consideration of the panel's recommendation vitiated the classifica-

tion given the registrant, because it did not appear that the panel's inquiry was limited to "ecclesiastical questions" and that the identity of the members of the panel had been disclosed to the registrant. The result of the decision of the court below and of the court in the *Levy* case is that the classification of every registrant whose case was considered by the panel before April 30, 1945, the date of the *Levy* decision, is vulnerable, for the practice followed in these cases was routine.

In our view, so long as the advisory panel limits its inquiry to whether the registrant's claim to classification in IV–D is sound and so long as the advisory nature of its recommendation is made clear to the classifying boards, there is no basis for judicially invalidating a classification, absent a showing that the final classifying board did not exercise an independent judgment in classifying the registrant. The identity of the members of the panel was not concealed from respondents, who appeared before the panel and could have asked for the names of the sitting members if they desired this information. Information in this respect would have been readily available to them if they had sought it.

1. *The background of the Advisory Panel on Theological Classifications.*—In New York City, where the panel operates, the City Director possesses the same status as the State Director of Selective Service in the various states (see Regs.

603.11–603.12–1, *infra*, pp. 55–56).[10] He is thus responsible for the administration of the Selective Training and Service Act and the Selective Service Regulations in New York City. Among the responsibilities lodged in the City Director by the Selective Service Regulations is the duty to supervise the local and appeal boards in New York City. He possesses authority to review classifications made by local boards and by boards of appeal within his territorial jurisdiction for the purpose of initiating further action in cases where the classifications made by the boards are believed to be improper. Thus, the City Director may require a local board to reopen and consider anew the classification of a registrant (Reg. 626.2 (b), *infra*, pp. 59–60); he may appeal from any determination of a local board to a board of appeal (Reg. 627.1, *infra*, p. 60); he may require a board of appeal to reconsider its decision (Reg. 627.61, *infra*, pp. 62–63); and he may appeal from any determination of a board of appeal to the President (Reg. 628.1, *infra*, pp. 63–64). Quite plainly, the regulations are designed to permit close supervision over the boards. The necessity for this supervision stems from the fact that the boards are comprised of part-time volunteers who are not always experienced in the intricacies of weighing evidence, or in resisting pressure from persons

[10] The State Director for New York has jurisdiction over all of New York State, except New York City.

seeking exemption or deferment from military service, or in resisting occasional pressure from the community to deny such exemption or deferment to registrants entitled to it; and, most important, they are not equipped independently to investigate claims for exemption or deferment from military service.

Because the proceedings before the boards are non-adversary in character and, for the most part, only the evidence adduced by the registrant is available to the board, the City Director maintains a staff which constantly reviews local board files and investigates doubtful claims. It is in the performance of this function that the City Director found it desirable to establish the theological panel. Experience demonstrated that selective service personnel very often had difficulty in properly evaluating claims to classification in IV-D because they were unfamiliar with the educational practices in the various religious groups, and also because many of the religious sects are loosely controlled, with no central authority to determine who are ministers within the sect.

Accordingly, in December 1942 and January 1943, the City Director organized in his office an Advisory Panel on Theological Classifications. The function of the panel is to make recommendations in close cases involving claims for theological exemption which might be used as advisory opinions

by the local boards and which advise the City Director whether action on his part is required, either to take an appeal or to request a local board to reopen a classification. The panel is composed of two sections. The membership of one section consists of prominent laymen and rabbis of the Jewish faith who limit their activities to cases involving registrants who claim to be rabbis or to be students preparing for the ministry in the Jewish religion. A second section is comprised of representative persons from other religious groups who consider similar questions involving other registrants. The members of the panel are volunteers, each of whom has taken an oath of office as required by Section 602.4 of the Selective Service Regulations, *infra*, p. 54. We have set forth in Appendix C, *infra*, pp. 67–73, a list, furnished by the Selective Service System, of the members of the first section of the panel with a brief summary of their qualifications.

In essence, the panel was created to perform, in the field of theological classifications, the same function which the Department of Justice performs in cases of persons claiming classification as conscientious objectors (see Sec. 5 (g), *infra*, pp. 48–49), i. e., to investigate the registrant's claim, interview him, analyze the significant facts pertaining to the claim, and make an advisory recommendation concerning the merits of the claim.

The cases which have come before the panel for recommendation have been cases uncovered by

representatives of the City Director in periodic reviews of local board files and, in some instances, cases where a local board has requested an advisory opinion from the City Director.[11] We are advised by the Selective Service System that of all the cases involving theological claims which have been referred to the City Director or which have come before him for review, approximately 40% were deemed to warrant referral to the theological panel for an advisory recommendation. In the other 60% of the cases, the claims were determined to be so free from doubt as not to require the specialized assistance of the panel. As of December 1945, the section of the panel involved in the present cases had recommended in favor of the registrant's claim to exemption in approximately 65% of the cases.

In practice the panel functions in the manner shown by the records in these cases. If the City

[11] In Bulletin No. 94, issued July 31, 1943, by the City Director, the selective service agencies were advised, as follows:

"Advisory panels of outstanding religious representatives have been established by this Headquarters for the purpose of considering the cases of Ministers of Religion and Theological Students, and submitting advisory recommendations as to their proper classification.

"Local Boards may submit doubtful cases to this Headquarters for advisory opinions by the Panels. This applies not only to future cases but to cases already classified in which there has been some question of doubt. The recommendation of the Panel will be submitted to the Local Board with a transcript of any testimony taken.

"The recommendations of the Panels are purely advisory and are in no way binding upon the Local Boards."

Director determines that a case warrants referral to the panel, the registrant is requested to appear before the panel for a hearing relative to his claim to classification in IV-D. The panel has before it the registrant's selective service file and the registrant is permitted to furnish additional evidence and to explain the basis for his claim to exemption. A stenographic transcript is made of the hearing. The panel prepares its recommendation and together with a transcript of the hearing, the recommendation is transmitted to the City Director. If the Director agrees with the recommendation of the panel, he then directs the local board to reopen the registrant's classification and to consider the information developed at the panel's hearing and the advisory recommendation of the panel. The recommendation of the panel, a statement of the panel's reasons for its recommendation,[12] and a copy of the transcript of the hearing are submitted to the local board for its consideration, and these documents are placed in the registrant's selective service file, where they are available for inspection by the

[12] In the *Levy* case the circuit court of appeals laid great stress on the fact that the local board received only a bare recommendation from the panel, without a statement of facts or reasons for the recommendation (149 F. 2d at p. 341). In the present cases this element is lacking, for the boards received detailed explanations from the panel as to the reasons for its recommendations (*supra*, pp. 8–11, 16–17).

registrant (Reg. 605.32, *infra*, p. 57).[13] In each case the local board is specifically advised that the panel's recommendation is advisory only and that it is the responsibility of the local board to classify the registrant.

Thus, for example, in the *Horowitz* case, No. 58, the facts summarized in the Statement, *supra*, pp. 4–14, show that respondent was classified in IV-D by the local board on November 2, 1941. In April 1944, the City Director undertook a review of Horowitz' file and, as a result, respondent was requested to appear before the theological panel on May 2, 1944. Respondent appeared before the panel and the transcript of the hearing, which is before the Court as an original exhibit, reveals that the panel inquired concerning his family status; his occupation; his education; the nature of his studies for the ministry; his understanding of various basic principles in the religion; and the conflicts in the information which he furnished the local board. Thereafter the City Director requested the local board to reopen respondent's classification and he forwarded to the board a transcript of the hearing and a statement prepared by the panel explaining in detail its reasons for recommending

[13] Thus, it appears from the statement on appeal prepared by respondent Samuels under date of October 23, 1944, which is in his selective service file, that he examined the panel's recommendation and replied to it.

against respondent's claim. All of these documents were placed in respondent's file and after further proceedings before the board Horowitz was ultimately classified I-A. Upon his appeal, all of the information was submitted to the board of appeal, which also classified him I-A.

2. *The advisory panel does not invade the statutory function of the classifying boards.*— Since respondents were finally classified by their boards of appeal, it was their burden on habeas corpus to demonstrate that these boards, not the local boards, departed from the Act or regulations in classifying them. *Bowles* v. *United States,* 319 U. S. 33; *Falbo* v. *United States,* 320 U. S. 549, 555 (concurring opinion). Indisputably it was the function of the boards of appeal, pursuant to the Selective Service Regulations, to determine respondents' claims to exemption from military service. And if the boards abdicated this statutory duty, respondents' classifications are open to attack on habeas corpus.

Our difficulty with the decision of the circuit court of appeals is that nothing in the records before the court demonstrated that the boards of appeal did not fully perform their statutory duty. Respondents adduced no evidence at their habeas corpus hearings showing that the boards of appeal did not consider all the evidence which they submitted, or that the boards acted on any basis other than the evidence before them. Likewise, they made no showing that they were in any

sense denied a fair hearing before the theological panel; or that they were denied the opportunity to challenge the recommendations of the theological panel; or that the panel's recommendations had no foundation in the facts before it; or that they sought to ascertain the identity of the members of the panel and were refused this information; or that the classifying boards considered themselves bound by the recommendations of the panel.

The sole basis for the decision below is the circumstance that the advisory recommendations of the panel were included in the materials which were before the boards of appeal and presumably were considered by the boards. We agree with the Circuit Court of Appeals for the Fifth Circuit (*United States ex rel. Goodman* v. *Hearn*, 153 F. 2d 186, writ of certiorari dismissed pursuant to stipulation) that this fact by itself does not permit the conclusion that the boards of appeal abdicated their statutory function.[14]

[14] Compare *United States ex rel. Trainin* v. *Cain*, 144 F. 2d 944 (C. C. A. 2), certiorari denied, 323 U. S. 795. The registrant in that case contended, in the circuit court of appeals and on petition for a writ of certiorari, that his classification was illegal because the local board considered the recommendation of the advisory panel. The circuit court of appeals flatly rejected the contention, and certiorari was denied. The subsequent decision in the *Levy* case expressly qualifies the decision in the *Trainin* case. See also, *United States ex rel. Isseroff* v. *Cain*, 57 F. Supp. 715 (E. D. N. Y.), *United States ex rel. Steinberg* v. *Graham*, 57 F. Supp. 938 (E. D. Ark.),

A. As we have said, *supra*, p. 26, the theological panel performs the function in the field of theological classifications which the Department of Justice and its Hearing Officers perform in the field of conscientious objector classifications. The safeguards which the City Director adopted in the former instance are patterned after the safeguards which Congress provided in the field of conscientious objector classifications. Thus Section 5 (g) of the Act, *infra*, pp. 48–49, provides that when a registrant who claims exemption from military service as a conscientious objector takes an appeal to his board of appeal the "board shall forthwith refer the matter to the Department of Justice for inquiry and hearing by the Department or the proper agency thereof" and that—

> * * * a hearing shall be held by the Department of Justice with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board (1) that if the objector is inducted into the land or naval forces under this

United States ex rel. Goodstein v. *Mallon*, 61 F. Supp. 671 (D. Md.), and *United States ex rel. Yaroslawitz* v. *Fales*, 61 F. Supp. 960 (S. D. Fla.), where the courts sustained selective service classifications based in part upon recommendations of the panel. Compare *United States ex rel. Rubin* v. *Magruder*, 55 F. Supp. 947 (D. R. I.).

Act, he shall be assigned to noncombatant service as defined by the President, or (2) that if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be assigned to work of national importance under civilian direction. If after such hearing the Department finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall give consideration to but shall not be bound to follow the recommendation of the Department of Justice together with the record on appeal from the local board in making its decision. * * *

In practice this statutory provision has operated as follows: When a person asserting conscientious objections takes an appeal and the board of appeal determines preliminarily that he is not entitled to deferment or exemption from military service, the board is required to refer his selective service file to the appropriate United States Attorney. The registrant's claim is investigated by the F. B. I., and after its report is made the matter is referred to a Department of Justice Hearing Officer, who conducts a hearing at which the registrant appears and is given the opportunity to adduce evidence, to explain his position and to reply to any adverse evidence which may be developed at the hearing. There-

after, the hearing officer prepares a recommendation concerning the registrant's claim. The recommendation summarizes the facts and states the Hearing Officer's reasons in support of the recommendation. If the recommendation is approved by the Department of Justice, it is forwarded to the appropriate board of appeal which then classifies the registrant.[18]

The parallel between this procedure and the procedure followed in New York City in dealing with theological classifications is for all practical purposes absolute. The theological panel performs the same function as the Department's Hearing Officer.

Particularly significant, in view of the limitation to "ecclesiastical questions" which the *Levy* decision imposed upon the panel, is the fact that, while the subject matter of the inquiry is different, the scope of the inquiry by each is the same. The Hearing Officer considers the information contained in the registrant's selective service file together with the information which the F. B. I. investigation reveals and the information developed at the hearing. On the basis of all the information pertinent to the question whether the registrant should be classified in IV–E, the Hearing Officer prepares a written recommendation for or against classification in IV–E which, when

[18] See Department of Justice Circular No. 3461, issued February 11, 1941, and the various supplements to it which have been issued from time to time.

approved by the Department of Justice, is forwarded to the board of appeal. Likewise the panel considers the information shown by the selective service file and the information which is developed at its hearing and on the basis of all the information which is pertinent to the question whether the registrant should be classified IV–D, it prepares a written recommendation which is ultimately forwarded to the classifying board and is placed in the registrant's file. In both instances the recommendation informs the boards of the facts considered and of the reasons for the recommendation (see *supra*, pp. 8–11, 16–17, 34). Both recommendations are advisory only and the boards are instructed accordingly.[16]

The court below, as well as the Circuit Court of Appeals for the Second Circuit in the *Levy* case, purported to be enforcing the congressional policy manifest in the Act, that classifications shall be made by the local boards or by the appropriate appellate agencies, when it held respondents' classifications invalid. In doing so, however, the court overlooked the procedure

[16] In addition to the general instruction to all selective service boards that "the recommendations of the Panels are purely advisory and are in no way binding upon the Local Boards" (see note 11, *supra*, p. 27), the local boards in both the *Horowitz* and *Samuels* cases were specifically instructed, at the time that the recommendations were submitted to them, that consideration should be given to the recommendation of the advisory panel but that the responsibility for determining the registrant's classification rests with the boards or the appropriate agency of appeal (*supra*, pp. 8, 16–17).

which Congress created in Section 5 (g) for conscientious objectors and upon which the panel procedure is patterned. Quite plainly, when Section 5 (g) and Section 10 (a) (2) are read together, as they must be, it becomes evident that Congress saw no unreasonable interference with the power to classify, which it lodged in the boards, in the fact that the Department of Justice conducted a hearing into the registrant's claim and made an advisory recommendation to the board, which in terms either approved or disapproved classifying the registrant in IV-E. Apart from the fact that the theological panel was created by the City Director rather than directly by Congress, we perceive no basis for distinguishing between the conscientious objector cases and these cases. The advisory recommendations of the theological panel which were made in the instant cases are no more an interference with the classifying function of the local and appeal boards than is the advisory recommendation of the Department of Justice made pursuant to Section 5 (g). Rather than interfering with the statutory duties of the boards, the advisory recommendations complement the boards' activities by making available to them the results of the investigations of the advisory agencies and the considered judgments of persons peculiarly well qualified to inquire into the questions upon which they make recommendations.

The advisory recommendations are helpful not only to the boards. The theological panel also operates to the advantage of the registrant. Because the panel is specially qualified to deal with the complex theological questions involved in many of these cases, it is capable of protecting the interests of registrants having legitimate claims for exemption and at the same time it is peculiarly well qualified to detect unwarranted claims which might appear valid to persons not familiar with the religious group with which the registrant is affiliated. In the present cases the claims of registrants of the Jewish faith were considered by prominent and well qualified members of that faith, whose only motive in performing this task was to assist the Government during a period of emergency.

The fact that Congress provided in detailed terms in Section 5 (g) of the Act for the advisory recommendation of the Department of Justice does not, we think, demonstrate that Congress did not authorize the use of advisory recommendations in other situations. For with the exception of Section 5 (g), which relates to a problem that had proved troublesome in the First World War,[17] Congress did not undertake to spell out the

[17] The detailed provisions of Section 5 (g) embody a compromise plan worked out between representatives of various religious organizations who were concerned with the treatment of conscientious objectors and representatives of the Government, whereby conscientious objector claims would

details of selective service organization and procedure. Instead, Congress provided in Section 10 (a) (2) that the President is authorized "to create and establish a Selective Service System," including local and appeal boards and "such other agencies" as may be necessary to carry out the provisions of the Act, and Congress provided that the President may delegate his authority under the act to the Director of Selective Service and that the latter may delegate any authority delegated to him by the President to such persons as he designates or to persons who are designated pursuant to regulations prescribed by him (sec. 10 (b)). The City Director of New York is such a person (Reg. 603.12–1). In the exercise of the authority delegated to him, the City Director found it necessary, in carrying out the provisions of the act in New York City, to establish a theological panel to assist him in performing the functions vested in him by the Selective Service Regulations and to assist the classifying boards by making available to those boards the same kind of specialized assistance which the Department of Justice makes available to the appeal boards in conscientious objector cases.[18] The City Director's

be insured a hearing before the Department of Justice. See Hearings before the House Committee on Military Affairs on H. R. 10132, 76th Cong., 3d sess., Vol. 1, p. 206.

[18] We have been advised by the Selective Service System that the national office is familiar with the panel's function in New York City and has approved of its work and that the

implicit finding in this respect rests firmly on his experiences in administering the act in New York City. We submit that the advisory panel on theological classifications is plainly within the category of "such other agencies" which Congress authorized in Section 10 (a) (2).

There is nothing novel in the fact that the recommendations of the theological panel are made available to the classifying boards to assist them in performing their statutory functions. For example, during the first World War, District Boards (now called appeal boards) were vested with the function of passing on claims to deferment on occupational grounds. "Industrial advisers" were appointed for each board whose function it was, *inter alia,* to supplement the board's information with "all facts and information in their possession as to the Preference Lists issued by the Priorities Division of the War Industries Board," provided, however, that the Lists "shall not be regarded as binding upon the District Board." See Section 80 of the 1917 Selective Service Regulations (*infra,* pp. 64–66).

During the present period of war and the precedent mobilization, it has been the common prac-

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Director of Selective Service did not formally authorize the creation of the panel, "because it was felt that the divinity student problem in New York City was a problem peculiar to that city which could be handled under the administrative jurisdiction of the Director of Selective Service for New York City."

tice for the boards to consider advisory recommendations in dealing with problems of classification. In determining whether a registrant should be deferred as an essential farm worker the boards have considered the advisory recommendations of the County War Boards established by the Department of Agriculture.[19] Advisory recommendations from the Procurement and Assignment Service of the Federal Security Agency have been considered in classifying doctors of medicine, dentists, veterinarians, and sanitary engineers.[20] State Director Advice No. 205, issued May 22, 1943, authorized the State Directors of Selective Service to accept the advisory assistance of Pharmacy Advisory Committees in dealing with the classification of pharmacists and students of pharmacy. Local Board Memorandum 115–M, issued November 26, 1945, and amended January 2, 1946, recognizes the Office of Scientific Research and Development as a certifying agency with respect to the classification of certain students, teachers and research workers in the physical sciences. We are advised by the Selective Service System that numerous other advisory committees have been infor-

[19] See Local Board Memorandum No. 164, issued November 17, 1942, as amended April 5, 1944. This practice has been considered and approved by the Circuit Court of Appeals for the Ninth Circuit. *Cramer* v. *France*, 148 F. 2d 801; *Sullivan* v. *Swatzka*, 148 F. 2d 965, certiorari denied, 326 U. S. 752.

[20] See State Director Advice No. 271, issued June 8, 1944.

mally approved as advisory and informational sources for the classifying boards. And, in many instances, as in *Horowitz'* case (*supra*, p. 11), the classifying boards have on their own initiative invited advisory recommendations from persons in the community who are specially qualified to assist the boards.

Neither the Selective Training and Service Act nor the Selective Service Regulations limit the sources from which the classifying boards may receive information bearing on a registrant's classification.[21] So long as the information is relevant to the inquiry and is placed in the file, where the registrant may examine it and reply to it, we think it immaterial whether the information comes from the registrant, his neighbors, selective service investigators or, as in these cases,

[21] Section 621.7 of the Regulations provides:

"(a) The local board is authorized to request and receive information from local welfare and governmental agencies where such information will assist it in determining the proper classification of a registrant.

"(b) The local board is authorized to request the State Director of Selective Service to secure information from State or National welfare and governmental agencies where such information will assist it in determining the proper classification of a registrant."

In our view, this provision authorizes the local boards to seek additional information from the agencies mentioned; it does not foreclose a board from receiving information from any source. In any event, as we have shown, *supra*, pp. 37–39, the theological panel is an agency created under the Selective Training and Service Act and is thus a governmental agency within the meaning of Section 621.7.

from an expert advisory body established within the Selective Service System.

In short, we think that the theological panel was properly created under Section 10 (a) (2) of the Act pursuant to the power delegated to the City Director; and that, as in the conscientious objector cases where the Department inquires into the question whether a registrant should be classified IV–E, the panel properly is permitted to conduct a hearing and to make a recommendation on the ultimate question whether the registrant should be classified IV–D.

B. As we have shown in the Statement, each respondent appeared before the Theological Panel and was interrogated by members of the panel. Notwithstanding this fact, respondents have suggested (Br. Opp. 9–11) that their classifications are invalid because they were not apprised of the identity of the members of the panel before whom they appeared. Their argument, relying on the *Levy* decision, 149 F. 2d at p. 341, was that if they had been furnished this information they would have been better able to challenge the competence of the Panel. The difficulty with the argument is that although respondents had ample opportunity to obtain the information, there is no evidence that they sought this information and were denied it by the Selective Service System, or that they sought to challenge the Panel's recommendation on any ground resting on the identity of the members of

the Panel. Realistically viewed, their argument was that because the draft officials did not on their own initiative undertake to identify the Panel members for respondents the classifications are void. The short answer to this argument is the one which the Circuit Court of Appeals for the Fifth Circuit made in *United States ex rel. Goodman* v. *Hearn*, 153 F. 2d 186, 189, that if inquiry had been made the information would have been forthcoming.

If respondents had desired to challenge the competence of the Panel they had numerous opportunities to secure the information which they now deem so vital. When respondents appeared before the Panel they, of course, met the sitting members of the panel face to face and they could have ascertained the names of these persons merely by asking. They did not do so. Thereafter, respondents had numerous appearances before their local boards, but they at no time inquired of the boards concerning the identity of the persons before whom they appeared. Although it was the City Director's office which invited respondents to appear before the Panel, they directed no inquiry to that office concerning the identity of the persons in question.

Respondents' situation is no different from that of a lawyer who appears before a circuit court of appeals. In most instances, he does not know which three judges will be on the bench until he appears before the court for argument. At the argument the

judges are not formally identified for counsel. Instead, the burden is on counsel to make inquiry if he desires information concerning the sitting judges. Similarly, it is not the practice for members of a local board to identify themselves to every registrant who comes before them. Nor does a board of appeal specify the name of every board member when its decision is submitted to the local board. And on appeal to the President the identity of the members of the Presidential Appeal Board which makes a recommendation to the Director of Selective Service in each case, is not formally announced. Instead, the membership of these boards is an item of public information which is available to anyone who makes inquiry.

Thus, for example, it appears from the selective service file in *Gibson* v. *United States*, No. 23, this Term, that Gibson desired the names of the members of his local board for use in his criminal trial. As would be expected, to secure this information he requested the board to furnish to him a list of the local board members, a list which he duly received. Similarly, in these cases, if respondents were disposed to challenge the participation of any member of the panel in the hearing of their cases—assuming that there could be a basis for challenge—they need only have inquired of the City Director's office and the same information which we have printed in Appendix C, *infra*, pp. 67–73, would have been made available to them.

It is clear from what has been said that there is nothing secret about the panel. Indeed, an administrative purpose to conceal the identity of its members, which is what respondents seemed to argue, is hardly compatible with the plain purpose of the panel. While the panel's place in the Selective Service System is that of an expert advisory body, the selection of persons for membership on the panel quite obviously was based on more than their technical knowledge of the questions involved. Prominent rabbis, judges and educators were named to the panel because, in addition to their special competence, they are persons who are well known to the people in the locality where the panel operates, so that there is more likelihood that their judgments will be accepted by the community as judgments based on the merits of each case without regard to extraneous influences and pressures.[22] If secrecy were the motive of the City Director and technical competence were the sole criterion for membership on the panel, relatively unknown religious scholars would, it would seem, have been more likely selections.

[22] We are advised by the Selective Service System that all members serving on the Jewish Section of the panel have received the endorsement of the Synagogue Council of America, a national religious organization which represents the Rabbinical Council of America; the Rabbinical Assembly of America; the Central Conference of American Rabbis; the Union of Orthodox Jewish Congregations of America; the United Synagogue of America; and the Union of American Hebrew Congregations.

Apart from the fact that the panel scheme rests in part upon the community's recognition of the high caliber of its membership, there is little likelihood that the identity of persons as prominent in the religious and public life of New York City as are the members of the panel could be concealed even if such a purpose be assumed. For example, when Goodman appeared before the panel (*United States ex rel. Goodman* v. *Hearn*, 153 F. 2d 186, 189 (C. C. A. 5)) he recognized two members of the panel. See also *United States ex rel. Goodstein* v. *Mallon*, 61 F. Supp. 671, 674 (D. Md.); *United States ex rel. Yaroslawitz* v. *Fales*, 61 F. Supp. 960, 962 (S. D. Fla.). It is not unlikely that numerous other registrants had the same experience.

It is difficult for us to believe that the mere failure of the members of the panel to identify themselves to each registrant as he appeared before them could destroy the vitality of an otherwise valid selective service classification made, as here, by appeal boards having all the evidence before them. Respondents had ample opportunity to gain knowledge of the identity of the members of the panel if they desired that information. Their failure to do so suggests that the point which they now make is a mere afterthought. In any event, we think that, absent a showing that respondents were refused information bearing on the identity of the members of the panel and pertinent to an inquiry into the

competence of those persons to participate in hearing respondents' cases—and no such showing is made here—there is no justifiable basis for invalidating the present classifications.

CONCLUSION

Respondents have failed to show that their classifications were not made in conformity with the Selective Training and Service Act and the Selective Service Regulations. It is plain from Section 5 (g) of the Act that a classifying board does not abdicate its function merely by considering an advisory recommendation as to the propriety of exempting a registrant from military service. Since the court below reached an opposite conclusion while purportedly enforcing the will of Congress, the judgments below should be reversed and respondents remanded to petitioner's custody.

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.
THERON L. CAUDLE,
Assistant Attorney General.
ROBERT S. ERDAHL,
IRVING S. SHAPIRO,
Attorneys.

OCTOBER 1946.

APPENDIX A

The Selective Training and Service Act of 1940, as amended (54 Stat. 885, 50 U. S. C. App. 301, et seq.) provides in part as follows:

> SEC. 5. * * * (d) Regular or duly ordained ministers of religion, and students who are preparing for the ministry in theological or divinity schools recognized as such for more than one year prior to the date of enactment of this Act, shall be exempt from training and service (but not from registration) under this Act.
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> * * * * *
>
> (g) Nothing contained in this Act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Any such person claiming such exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the land or naval forces under this Act, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be assigned to work of national importance under civilian direction. Any such person claiming such exemption from combatant training and service because

of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board provided for in section 10 (a) (2). Upon the filing of such appeal with the appeal board, the appeal board shall forthwith refer the matter to the Department of Justice for inquiry and hearing by the Department or the proper agency thereof. After appropriate inquiry by such agency, a hearing shall be held by the Department of Justice with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board (1) that if the objector is inducted into the land or naval forces under this Act, he shall be assigned to noncombatant service as defined by the President, or (2) that if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be assigned to work of national importance under civilian direction. If after such hearing the Department finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall give consideration to but shall not be bound to follow the recommendation of the Department of Justice together with the record on appeal from the local board in making its decision. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall

be listed by the local board on a register of conscientious objectors.

* * * * *

SEC. 10. (a) The President is authorized—

(1) to prescribe the necessary rules and regulations to carry out the provisions of this Act;

(2) to create and establish a Selective Service System, and shall provide for the classification of registrants and of persons who volunteer for induction under this Act on the basis of availability for training and service, and shall establish within the Selective Service System civilian local boards, civilian appeal boards, and such other agencies, including agencies of appeal, as may be necessary to carry out the provisions of this Act. There shall be created one or more local boards in each county or political subdivision corresponding thereto of each State, Territory, and the District of Columbia. Each local board shall consist of three or more members to be appointed by the President, from recommendations made by the respective Governors or comparable executive officials. No member of any such local board shall be a member of the land or naval forces of the United States, but each member of any such local board shall be a civilian who is a citizen of the United States residing in the county or political subdivision corresponding thereto in which such local board has jurisdiction under rules and regulations prescribed by the President. Such local boards, under rules and regulations prescribed by the President, shall have power within their respective jurisdictions to hear and determine, subject to the right of ap-

peal to the appeal boards herein authorized all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this Act of all individuals within the jurisdiction of such local boards. The decisions of such local boards shall be final except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe. Appeal boards within the Selective Service System shall be composed of civilians who are citizens of the United States. The decision of such appeal boards shall be final in cases before them on appeal unless modified or changed by the President as provided in the last sentence of section 5 (l) of this Act. No person who is an officer, member, agent, or employee of the Selective Service System, or of any such local or appeal board or other agency, shall be excepted from registration, or deferred from training and service, as provided for in this Act, by reason of his status as such officer, member, agent, or employee;

(3) to appoint, by and with the advice and consent of the Senate, and fix the compensation of at a rate not in excess of $10,000 per annum, a Director of Selective Service who shall be directly responsible to him and to appoint and fix the compensation of such other officers, agents, and employees as he may deem necessary to carry out the provisions of this Act: *Provided*, That any officer on the active or retired list of the Army, Navy, Marine Corps, or Coast Guard, or of any reserve component thereof or any officer or employee of any department or agency of the United States who may be assigned or

detailed to any office or position to carry out the provisions of this Act (except to offices or positions on local boards or appeal boards established or created pursuant to section 10 (a) (2)) may serve in and perform the functions of such office or position without loss of or prejudice to his status as such officer in the Army, Navy, Marine Corps, or Coast Guard or reserve component thereof, or as such officer or employee in any department or agency of the United States: *Provided further,* That any person so appointed, assigned, or detailed to a position the compensation in respect of which is at a rate in excess of $5,000 per annum shall be appointed, assigned, or detailed by and with the advice and consent of the Senate: *Provided further,* That the President may appoint necessary clerical and stenographic employees for local boards and fix their compensation without regard to the Classification Act of 1923, as amended;

(4) to utilize the services of any or all departments and any and all officers or agents of the United States and to accept the services of all officers and agents of the several States, Territories, and the District of Columbia and subdivisions thereof in the execution of this Act;

* * * * *

(b) The President is authorized to delegate to the Director of Selective Service only, any authority vested in him under this Act (except section 9). The Director of Selective Service may delegate and provide for the delegation of any authority so delegated to him by the President and any other authority vested in him under this

Act, to such officers, agents, or persons as he may designate or appoint for such purpose or as may be designated or appointed for such purpose pursuant to such rules and regulations as he may prescribe.

(c) In the administration of this Act voluntary services may be accepted. * * *

* * * * *

APPENDIX B

PERTINENT SELECTIVE SERVICE REGULATIONS

602.2 *Voluntary services.*—Voluntary services in the administration of the selective service law may be accepted and should be encouraged. (6 F. R. 6826.)

* * * * *

602.4 *Oath of Office and Waiver of Pay or Compensation* (Form 21).—(a) Every person who undertakes to render voluntary uncompensated service in the administration of the selective service law shall, before he enters upon his duties, execute an Oath of Office and Waiver of Pay or Compensation (Form 21).

(b) Every person who undertakes to render compensated service in the administration of the selective service law shall, before he enters upon his duties, execute the Oath of Office portion of Form 21, but shall not execute the Waiver of Pay or Compensation portion of Form 21.

(c) When executed in the manner herebefore provided, the Oath of Office and Waiver of Pay or Compensation (Form 21) shall be sent to the State Director of Selective Service for filing. (6 F. R. 6826.)

* * * * *

603.1 *Director of Selective Service.*—The Director of Selective Service is responsible directly to the President. He is hereby charged with the administration of the selective service law and is hereby authorized and directed:

(a) To prescribe such amendments to these regulations as he shall deem necessary.

(b) To issue such public notices, orders, and instructions as shall be necessary to the efficient administration of the selective service law.

(c) To obligate funds appropriated for the administration of the selective service law.

(d) To appoint such officers, employees, assistants, and deputies whose salary is $5,000 per annum or less, as shall be necessary to the efficient administration of the selective service law.

(e) To perform such other duties as shall be required of him under the selective service law.

(f) To delegate any of his functions and powers to such officers, agents, or persons as he may designate. (6 F. R. 6827.)

* * * * *

603.11 *Governor.*—The Governor of each State shall have charge of the administration of the selective service law in his State. The office by means of which he performs his selective service functions shall be called "State Headquarters for Selective Service." State Headquarters for Selective Service shall be an office of record for selective service operations only; all selective service records and no other records shall be maintained in this office. For the operation of State Headquarters for Selective Service any necessary expense, including the hire of clerical personnel, shall be paid for by the Federal Government as provided in these regulations. (6 F. R. 6827.)

603.12 *State Director of Selective Service.*—The Governor of each State is authorized to recommend for appointment an

official to whom he may delegate his administrative functions relating to selective service. This official, if so recommended and appointed, shall be called the "State Director of Selective Service" and shall be in immediate charge of State Headquarters for Selective Service. (6 F. R. 6827.)

603.12–1 *Director of Selective Service for New York City may be appointed.*—Subject to the approval of the Director of Selective Service, the Governor of New York is authorized to recommend for appointment a second official to whom he may delegate his administrative functions relating to all selective service matters within the city of New York. This second official, hereinafter referred to as the "City Director," if so recommended and appointed, shall have jurisdiction in all selective service matters within the city of New York and in connection therewith shall have all the functions, duties, powers, and responsibilities of a State Director of Selective Service. If and when the City Director is appointed, the State Director of Selective Service for New York shall be relieved from his responsibilities and his functions, duties, and powers with reference to selective service matters within the city of New York: *Provided, however,* That the City Director shall continue to be subject to such supervision of the State Director of Selective Service as the Governor of New York shall direct, but not otherwise. (8 F. R. 3514.)

* * * * *

604.51 *Appointment and tenure.*—Subject to instructions given and limitations imposed by the Director of Selective Service, the State Director of Selective Service

shall appoint employees for his State Headquarters for Selective Service. (8 F. R. 11126.)

* * * * *

605.32 *Information not confidential as to certain persons.*—No information in a registrant's file shall be confidential as to the persons designated in this section, and any information may be disclosed or furnished to or examined by such persons, namely:

(a) The registrant, or other person having written authority from the registrant.

(b) All personnel of the Selective Service System while engaged in the administration of the Selective Training and Service Act of 1940, as amended.

(c) United States Attorneys and their duly authorized representatives, including agents of the Federal Bureau of Investigation.

(d) Any other agency, official or employee, or class or group of officials or employees, of the United States or any State or subdivision thereof, but only when and to the extent specifically authorized in writing by the State Director of Selective Service or the Director of Selective Service. (9 F. R. 9190.)

605.32–1 *Forwarding registrant's file to State Director of Selective Service.*—A local board, on written request of the State Director of Selective Service of the State in which such local board is located shall forward to such State Director of Selective Service the complete original file of any registrant under the jurisdiction of such local board. (9 F. R. 5472.)

* * * * *

621.7 *Securing information from welfare and governmental agencies.*—(a) The local board is authorized to request and receive information from local welfare and governmental agencies where such information will assist it in determining the proper classification of a registrant.

(b) The local board is authorized to request the State Director of Selective Service to secure information from State or National welfare and governmental agencies where such information will assist it in determining the proper classification of a registrant. (6 F. R. 6606.)

* * * * *

622.44 Class IV–D: *Minister of religion or divinity student.*—(a) In Class IV–D shall be placed any registrant: * * *

(3) who is a student preparing for the ministry in a theological or divinity school which has been recognized as such for more than one year prior to the date of enactment of the Selective Training and Service Act of 1940 (September 16, 1940), * * *. (9 F. R. 5202.)

* * * * *

623.1 *General principles of classification.* * * * (b) It is the local board's responsibility to decide in the first instance the class in which each registrant shall be placed. (6 F. R. 6611.)

* * * * *

623.2 *Information considered for classification.*—The registrant's classification shall be made solely on the basis of the Selective Service Questionnaire (Form 40), Affidavit of Dependent over 18 years of age (Form 40 A), Affidavit—Occupational Classification (Form 42), or Affidavit—Occu-

pational Classification (Form 42 A), and such other written information as may be contained in his file * * *. (9 F. R. 437.)

* * * * * *

626.1 *Classification not permanent.*— (a) No classification is permanent. * * * (6 F. R. 6844.)

* * * * * *

626.2 *When registrant's classification may be reopened and considered anew.*— (a) The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any interested party in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; *Provided*, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (Form 150) or an Order to Report for Work of National Importance (Form 50) unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

(b) At any time before the induction of a registrant, the local board shall reopen

and consider anew such registrant's classification upon the written request of the State Director of Selective Service or the Director of Selective Service; *Provided,* That after a registrant has left the local board for delivery pursuant to an Order to Report for Work of National Importance (Form 50) the local board shall reopen and consider anew the classification of such registrant only upon the written request of the Director of Selective Service. (9 F. R. 11619.)

* * * * *

627.1 *Appeal by Director and State Director.* (a) Either the Director of Selective Service or the State Director of Selective Service as to local boards in his State, may appeal from any determination of a local board.

(b) Either the State Director of Selective Service or the Director of Selective Service may take such an appeal at any time. (6 F. R. 6845; 8 F. R. 16720; 10 F. R. 9210.)

* * * * *

627.24 *Review by board of appeal.* * * * (b) In reviewing the appeal, the appeal board shall not receive or consider any information which is not contained in the record received from the local board except (1) the advisory recommendation from the Department of Justice under section 627.25, and (2) general information concerning economic, industrial, and social conditions. (9 F. R. 1415.)

627.25 *Special provisions where appeal involves claim that registrant is a conscientious objector.*—(a) If an appeal involves the question of whether or not a registrant is entitled to be sustained in his claim that

he is a conscientious objector, the board of appeal shall take the following action:

(1) First determine whether the registrant should be classified in one of the classes set forth in section 623.21 in the order set forth except Class IV–F for physical or mental disability and, if it so determines, it shall place the registrant in such class; or

(2) If it determines that the registrant should not be classified in one of the classes set forth in section 623.21 and the registrant has claimed classification in Class IV–E, determine whether to place the registrant in such class and, if it so determines, it shall place the registrant in Class IV–E; or

(3) If it determines that the registrant should not be classified in one of the classes set forth in section 623.21 and the registrant has not claimed classification in Class IV–E but has claimed classification in Class I–A–O), determine whether to place the registrant in such class and, if it so determines, it shall place the registrant in Class I–A–O; or

(4) If it determines not to place such registrant in one of the classes set forth in section 623.21 or in Class IV–E or in Class I–A–O under the circumstances set forth in subparagraphs (1), (2), or (3) above, it shall transmit the entire file to the United States Attorney for the judicial district in which is located the office of the board of appeal for the purpose of securing an advisory recommendation from the Department of Justice.

No registrant's file shall be forwarded to the United States Attorney by any board of appeal, and any file so forwarded shall be returned, unless in the "Minutes of

Other Actions" on the Selective Service Questionnaire (Form 40) the record shows and the letter of transmittal states that the board of appeal reviewed the file and determined that the registrant should not be classified in one of the classes set forth in section 623.21 (except Class IV–F for physical or mental disability) or in Class IV–E or Class I–A–O under the circumstances set forth in subparagraphs (1), (2), or (3) above.

(b) The Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the board of appeal (1) that if the registrant is inducted into the land or naval forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall be assigned to work of national importance under civilian direction. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the board of appeal that such objections be not sustained. (6 F. R. 6846, 8 F. R. 16720.)

* * * * *

627.61 *Reconsideration of board of appeal determination.*—(a) When either the Director of Selective Service or the State Director of Selective Service deems it to be in the national interest or necessary to

avoid an injustice, he may, at any time, request a board of appeal to reconsider any determination made by it, stating his reasons for requesting such reconsideration. Upon receiving such a request a board of appeal will reconsider its determination in any case.

(b) At any time within 10 days after the date when the local board mails to the registrant a Notice of Classification (Form 57), as provided in section 627.31, or at any time before the registrant is mailed an Order to Report for Induction (Form 150), the government appeal agent, if he deems it to be in the national interest or necessary to avoid an injustice, may prepare and place in the registrant's file a recommendation that the State Director of Selective Service either request the board of appeal to reconsider its determination or appeal to the President. The registrant's file shall then be forwarded to the State Director of Selective Service. As soon as the State Director of Selective Service has acted upon the government appeal agent's request, he shall advise the local board and, if he determines neither to request the board of appeal to reconsider its determination nor to appeal to the President, he shall return the file to the local board. (7 F. R. 10520; 8 F. R. 6017.)

628.1 *Who may appeal to the President from any determination of a board of appeal.*—(a) When either the State Director of Selective Service or the Director of Selective Service deems it to be in the national interest or necessary to avoid an injustice, he may appeal to the President from any determination of a board of appeal. He may take such an appeal at any time.

(b) An appeal to the President may be taken by the Director of Selective Service (1) by mailing to the local board through the State Director of Selective Service a written notice of appeal or (2) by placing in the registrant's file a written notice of appeal and through the State Director of Selective Service, advising the local board thereof.

(c) An appeal to the President may be taken by the State Director of Selective Service (1) by mailing to the local board a written notice of appeal and directing the local board to forward the registrant's file to him for transmittal to the Director of Selective Service or (2) by placing in the registrant's file a written notice of appeal and advising the local board thereof. Before he forwards the registrant's file to the Director of Selective Service the State Director of Selective Service shall place in such file a written statement of his reasons for taking such appeal. (7 F. R. 10521.)

Section 80 of the Selective Service Regulations promulgated during the First World War, pursuant to the Selective Draft Act (50 U. S. C. App. 201 *et seq.*) provided, in pertinent part:

SECTION 80. Principles governing classification with respect to engagement in industries, occupations, or employments, including agriculture, found to be necessary to the maintenance of the Military Establishment or the effective operation of the military forces or the maintenance of national interest during the emergency.

District Boards are charged with the duty of selecting the individuals whose engagement in industry, including agriculture, or whose occupations or employments are such

as to require their continued service in civil life rather than in the Army.

In order to provide for the necessary adjustments between the necessities of the Military Establishment and the requirements of the industries, occupations, and employments, including agriculture, found to be necessary to the maintenance of the Military Establishment, the effective operation of the military forces, and the maintenance of the national interest during the emergency, there shall be appointed by each District Board three persons to be known as industrial advisers to the District Board.

One such person for each District Board shall be nominated by the Department of Labor, one by the Department of Agriculture, and one by each District Board, who shall thereupon be appointed by the respective District Boards.

Whenever, in the discretion of the President, more than three such industrial advisers are required by a District Board, the President may call upon the Department of Labor, or the Department of Agriculture, or the District Board to nominate such additional industrial advisers, who shall thereupon be appointed by such District Board.

Such industrial advisers so appointed by each District Board shall not in any sense be members of such District Board, shall have no right to vote at any meetings thereof, and shall have and exercise only the rights, duties, powers, and functions herein specifically given.

Such advisers shall have the right to furnish all pertinent information to the District Board and may attend meetings of

the Board upon request of the Board to which they are attached.

Such advisers may place before the District Board at its meetings, or at such other time as the Board may request, all facts and information in their possession as to the Preference Lists issued by the Priorities Division of the War Industries Board. Such lists shall not be regarded as binding upon the District Board in its conclusions as to whether or not any particular industry, occupation, or employment, including agriculture, is a necessary industry, occupation, or employment within the meaning of the law and regulations, nor shall such lists prevent the District Board from holding as necessary any industry, occupation, or employment, including agriculture, not contained therein. Such Preference Lists and other facts and information in the possession of such advisers will supplement the information in the possession of the District Boards and will also be used to assist the District Boards in dealing with specific cases.

APPENDIX C

PERSONNEL OF THE ADVISORY PANEL ON THEOLOGICAL CLASSIFICATIONS

The records of the Selective Service System reflect the following information concerning the members of the panel who make advisory recommendations in cases involving registrants of the Jewish faith:

Dr. Alexander M. Dushkin. Appointed: December, 1942.

Executive Vice-President of the Jewish Education Committee of New York.

Vice-President of the Hebrew Cultural Federation.

Formerly Professor of Hebrew at the Hebrew University of Jerusalem.

Formerly Supervisor of Jewish Schools for the Palestinian Government.

Hon. William S. Evans. Appointed: February, 1944.

Justice of the City Court of the City of New York.

Member of the Jewish Education Committee of New York.

Member of the B'nai B'rith.

Member of the Federation for the Support of Jewish Philanthropies of New York.

Dr. Louis Finkelstein. Appointed: December, 1942.

President of the Jewish Theological Seminary of America.

Rabbi Herbert S. Goldstein. Appointed: December, 1942.

Rabbi of the West Side Institutional Synagogue.

Honorary President of the Union of Orthodox Jewish Congregations of America.

Professor of Homiletics at the Yeshiva College of the Rabbi Isaac Elchanan Theological Seminary.

President of the Synagogue Council of America.

Member, Army and Navy Committee on Religious Activities of the Jewish Welfare Board.

Hon. Jonah J. Goldstein. Appointed: December, 1942.

Judge of the Court of General Sessions, New York County.

Member of the Board of Directors of the Jewish Education Committee of New York.

Trustee-at-large of the Federation for the Support of Jewish Philanthropies of New York.

Formerly a Member of the Administrative Committee of the Zionist Organization of America.

Rabbi A. M. Heller. Appointed: October, 1944.

Rabbi of the Flatbush Jewish Center.

President of the New York Board of Jewish Ministers.

Member of the Rabbinical Assembly of America.

Past-President of the Brooklyn Jewish Ministers Association.

Rabbi Leo Jung. Appointed: December, 1942.

Rabbi of the West Side Jewish Center.

Chairman of the Executive Committee of the Joint Distribution Committee.

Professor of Ethics at the Yeshiva College of the Rabbi Isaac Elchanan Theological Seminary.

Member, Army and Navy Commitee on Religious Activities of the Jewish Welfare Board.

Editor of the Jewish Library Series.

Rabbi Isaac Landman. Appointed: December, 1944.

Rabbi of the Congregation Beth Elohim.

Editor-in-chief of the Universal Jewish Encyclopedia.

Rabbi Israel H. Levinthal. Appointed: December, 1942.

Rabbi of the Brooklyn Jewish Center.

President of the Brooklyn Jewish Council.

Member of the National Executive of the Zionist Organization of America.

First President of the Brooklyn Jewish Ministers Association.

Hon. Samuel Levy. Appointed: December, 1942.

Chairman of the Board of Directors of the Rabbi Isaac Elchanan Theological Seminary and Yeshiva College.

Director of the Hebrew Free Burial Society.

Member of the Board of Trustees of the Congregation Kehilath Jeshurun.

Mr. Oscar Lewis. Appointed: December, 1942.

Vice-President of the Federation for the Support of Jewish Philanthropies of New York.

Chairman of the Board of the Brooklyn Jewish Community Council.

Trustee of the Hebrew Brooklyn Orphan Asylum.

Hon. Jacob H. Livingston. Appointed: February, 1944.

Justice of the Supreme Court of the State of New York.

Trustee-at-large of the Federation for the Support of Jewish Philanthropies of New York.

Member of the Advisory Board of the Jewish Board of Guardians, Brownsville Division.

Vice-Chairman and Former Chairman of the ORT of Brooklyn.

Rabbi Joseph H. Lookstein. Appointed: December, 1942.

Rabbi of Congregation Kehilath Jeshurun.

Honorary President of the Rabbinical Council of America.

Founder of the Ramaz School.

Member of the Zionist Emergency Committee.

Professor of Homiletics and Jewish Sociology at the Yeshiva College of the Rabbi Isaac Elchanan Theological Seminary.

Rabbi Morris Max. Appointed: July, 1944.

Rabbi of the Manhattan Beach Jewish Center.

Vice-President of the Rabbinical Council of America.

Dr. Samuel Nirenstein. Appointed: February, 1944.

President of the Union of Orthodox Jewish Congregations of America.

Member of the Executive Committee and Director of the Jewish Welfare Board.

Member of the Board of Directors of the Hebrew Teachers' Training School.

Co-Chairman of the National Orthodox Conference for Palestine and Rescue.

Member of the Board of Directors and Chairman of the Constitution Committee of the Rabbi Isaac Elchanan Theological Seminary and Yeshiva College.

Member of the Board of Directors of the Council of Orthodox Jewish Schools.

Hon. Samuel Null. Appointed: December, 1942.

Justice of the Supreme Court of the State of New York.

Member of the Board of Directors of the Jewish Education Committee of New York.

Member of the Zionist Organization of America.

Member of the Executive Committee of the Continuing Conference of the Jewish Theological Seminary of America.

Rabbi Ahron Opher. Appointed: July, 1944.

Rabbi of the Hebrew Tabernacle of Washington Heights.

Assistant to the President of the Synagogue Council of America.

Samuel Rothstein, Esq. Appointed: December, 1944.

President of the United Synagogue of America.

Member of the Administrative Committee of the Zionist Organization of America.

Member of the Executive and Interim Committee of the American Jewish Conference.

Member of the Board of Directors of the National Jewish Welfare Board.

Hon. E. Ivan Rubenstein. Appointed: February, 1944.

Justice of the Supreme Court of the State of New York.

Member of the United Synagogue of America.

Past-President and Member of the Board of Trustees of Temple Beth El.

Member of the Executive Committee of the Continuing Conference of the Jewish Theological Seminary of America.

Mr. Bernard Semel. Appointed: December, 1942.

Impartial Chairman of the Shirt Industry.

Secretary and Member of the Board of Directors of the Jewish Education Committee of New York.

Trustee of the Federation for the Support of Jewish Philanthropies of New York.

Member-at-large of the Board of Directors of the National Jewish Welfare Board.

Member of the American Jewish Committee.

Dr. Elias Solomon. Appointed: December, 1942.

Rabbi of Congregation Shaarezedek.

Honorary President of the United Synagogue of America.

Past-President of the Synagogue Council of America.

Past-President of the New York Board of Jewish Ministers.

Co-founder and Treasurer of the Jewish Braille Institute of America.

Member of the Board of Directors of the Young Men's Hebrew Association.

Hon. Meier Steinbrink. Appointed: October, 1944.

Justice of the Supreme Court of the State of New York.

Past-President and Trustee of Congregation Beth Elohim.

Member of the Federation for the Support of Jewish Philanthropies of New York.

Honorary Trustee of the Brooklyn Hebrew Orphan Asylum.

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IN THE

Supreme Court of the United States

MAY TERM—1946

No. [redacted] 58

GENERAL MADISON PEARSON, Post Commanding Officer, Fort Dix, New Jersey,

Petitioner,

against

UNITED STATES *ex rel.* HARRY HOROWITZ.

No. [redacted] 59

GENERAL MADISON PEARSON, Post Commanding Officer, Fort Dix, New Jersey,

Petitioner,

against

UNITED STATES *ex rel.* JACOB S. SAMUELS.

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

Harry Mesard
MEYER KREEGER,
Counsel for Respondents.

JUDICIAL PRINTING CO., INC., 82 BEEKMAN ST., N. Y.—BARCLAY 7—3648 9 131

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IN THE

Supreme Court of the United States

MAY TERM—1946

No. 947

GENERAL MADISON PEARSON, Post Commanding Officer, Fort Dix, New Jersey,

Petitioner,

against

UNITED STATES *ex rel.* HARRY HOROWITZ.

No. 948

GENERAL MADISON PEARSON, Post Commanding Officer, Fort Dix, New Jersey,

Petitioner,

against

UNITED STATES *ex rel.* JACOB S. SAMUELS.

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

Following their induction into the armed forces of the United States, respondents obtained writs of *habeas corpus* to review the propriety of said inductions. Upon the dismissal of the said writs by the United States District Court for the District of New Jersey, appeals were taken in each case to the United States Circuit Court of Appeals, which last mentioned Court reversed the orders of dismissal.

Statement as to Facts

Although the statement submitted by the petitioner on this application omits important facts and contains a number of inaccuracies as to others, the respondents, for the purpose of this application alone, are willing to adopt the same, in view of the fact that the nature of petitioner's application is not based upon the merits of respondents' claim insofar as the evidentiary facts are concerned.

As the record discloses, and as will be more particularly referred to herein, Selective Service Headquarters in New York City created a panel which it designated as the "Advisory Panel on Theological Classifications," and part of its purported functions was to examine Selective Service registrants claiming a IV-D classification, following which, recommendations regarding the classification of such registrants were transmitted to the local boards with which they had registered.

At page 2 of his petition under the caption "Question Presented," it appears that "the question presented is whether it was proper for the Selective Service Boards to consider these advisory recommendations in classifying respondents."

The Third Circuit Court in reversing the District Court wrote an opinion in which it appears that such reversal was based *solely* upon the actions of the said panel. Again, the only authorities referred to by petitioner on this application are those having to do with the propriety of the use of this panel,—decisions in different jurisdictions regarding the same.

In view of the above, we feel that any further presentation or discussion of the facts as are contained in the record would serve no useful purpose, as both the opinion and the sole question presented to this Honorable Court

in the petition herein constitute a question of law, not affected by the merits of the evidence submitted in behalf of respondents' claim for IV-D classification.

Opinions Below

The opinion of the Circuit Court of Appeals covered both cases and is reported in 151 Fed. (2d) 801.

Jurisdiction

Jurisdiction has been invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

POINT I

The "panel," the various steps taken by the Local Board, the Appeal Board and by New York City Selective Service Headquarters in connection therewith, the examination of the registrant by the panel through its members, its recommendation and the communication of the same to the Local Board were each and all, unauthorized, illegal and without any warrant in law.

At page 19 of his petition, the Solicitor General states that "we are advised by the Selective Service System" that the panel was established in January 1943 by the State Director of Selective Service for New York City. While we do not dispute the statement, the record herein is absolutely barren with respect thereto.

The State Director was appointed pursuant to the provisions of the Selective Training and Service Act of 1940, and his powers and duties are fully and specifically referred to therein, as well as in the Rules and Regulations adopted and promulgated in connection with the said Act.

We have been unable to find either in the Act or in the rules and regulations any authority for the creation of a panel of this nature.

As appears from the opinion in *U. S. ex rel. Rubin* v. *McGruder etc.*, 55 Fed. Supp. 947:

> "Lt. Colonel Durham testified that there was nothing in the Act providing for a theological panel or authorizing such a body as was used in the instant case; *that it exists only in New York* and was created by New York Headquarters to assist boards and advise them in cases involving divinity students." (Italics ours.)

There is nothing to indicate who created the panel, how it was chosen, the number of its members, who they are or who its chairman may be, if any; who, or how many sit on a case, whether a quorum is required, what the vote may be, unanimous or otherwise, and other elements too numerous to mention. Nor is there a suggestion as to its powers or limitations.

Selective Service Headquarters does not even permit the names of those present or the names of the person or persons who conducted the examination to appear on the transcript (R. 80-83). And the transcript is not even signed by a member or anyone else.

They give no reasons for their decisions, no basis for their opinions, and sign their names to nothing.

All we know is that it carries the impressive and dignified title of "Advisory Panel on Theological Classifications."

Search as one will, and no authority can be found to justify the registrant's appearance before and examination by any person or body other than the Local Draft Board and/or its members.

Again, Section 632.1 of the Selective Training and Service Act regulations, subdivision (b) thereof, provides:

> "It is the Local Board's responsibility to decide in the first instance the class in which each registrant shall be placed."

And there is an express direction with respect to divinity students covering this question, specifically provided for in Local Board Memorandum 187. Section 1, subdivisions a and b, sets forth the requirements necessary for a IV-D classification. Section 2 provides:

> "LOCAL BOARD TO MAKE DETERMINATIONS: The Local Board is charged with the *primary* responsibility of determining whether a registrant * * * fulfill(s) the above requirements of the Act and Regulations." (Italics ours.)

The Local Boards were created for the purpose of handling the cases of registrants within their respective immediate areas. The Act and regulations provide that through the medium of appeal boards, applications to Selective Service City Headquarters and appeals to the President, the machinery was set up whereby a registrant who felt that he had been unjustly dealt with by the Local Board or the Appeal Board could apply for relief to those higher in authority.

A court of last resort makes a "recommendation" to one of lower authority regarding a *decision* which the latter is about to render. The decision is made immediately thereafter and follows the recommendation made. How useless, how futile becomes an appeal from that decision to the authority upon whose recommendation the decision was based,—the *only* authority to which a final appeal may be taken?

By the creation of this panel and giving it the authority to examine the registrant, to be followed by a finding which

the highest authority, the City Director, transmits to the Local Board,—the very purpose of the regulation is defeated.

Petitioner seeks to justify the panel by reference to the Hearing Officer of the Department of Justice, medical boards under the Selective Service Act etc.; but their appointment and functions are specifically provided for by statute.

Repeated reference is made in the petition to the effect that the Local Board could seek information from any sources desired. Regulation 621.7 provides:

> "(a) The local board is authorized to request and receive information from local welfare and governmental agencies where such information will assist it in determining the proper classification of a registrant.
>
> (b) The local board is authorized to request the State Director of Selective Service to secure information from State or national welfare and governmental agencies where such information will assist it in determining the proper classification of a registrant."

Surely it will not be claimed that the panel is a Local, State or National welfare or governmental agency. In addition to these provisions we find authority for the use of "medical advisory boards" (Regulation 603.31) and one composed of "examining physicians and dentists" (Regulations 603.61, 603.62) but nothing in the entire regulations to even indirectly suggest authority for the appointment of a panel of this kind.

Petitioner, as has the government on previous occasions, attempts to justify the creation of the panel by Title 50, Appendix, Section 310, which provides for "volunteer services." This clearly has to do with members of the various Boards and such clerical help, etc., as might be

obtained without pay. Further, it seems useless to even suggest that if this section were to be applied in the manner suggested by the petitioner, that the Local Board could appoint anyone, with entirely unauthorized powers, just so long as he was a "volunteer."

That is exactly what was done by the creation of the panel, and the suggested result followed.

At pages 25 and 26 of the petition herein it is urged that "so long as the information is relevant to the inquiry *and placed in the file when the registrant may examine it and reply*" it is immaterial whether it comes from the registrant * * * or from an expert advisory body established within the Selective Service System." * * * Respondents had access to the recommendations *and had full opportunity to challenge them*" etc. (Italics ours.)

In the light of the factual situation, these statements conclusively indicate the arbitrary and illegal nature of the panel and its operations. At pages 8, 9 and 10 of the petition there appears what purports to be "a statement for the record, dated May 2, 1944, which had been prepared by the advisory panel." In the first place there is no evidence that it was so prepared and this Honorable Court will observe that it does not even bear a signature.

Reference to the record will show that it was enclosed in a communication sent by the "Chief, Legal Division," to the Chairman of the Local Board, which communication states in part what petitioner failed to incorporate in his petition, "Enclosed herewith is a copy of the *Confidential* Statement for the Record * * *" and that it should be "considered together with the other information of record in determining the registrant's classification." (Capitalization ours.)

A *confidential* statement that "registrant's attendance at the seminary has been motivated by the desire to secure a basis for exemption from training and service under

Selective Service law" together with a mass of hearsay, opinions and argument, unsupported by any evidence; unauthorized,—*not a member of the panel or anyone else* daring to subscribe his name thereto.

Surely the members of the Panel and the Chief of the Legal Bureau knew that Selective Service Regulation 605.32 specifically provides that:

> "No information shall be confidential as to * * * (1) the registrant, or any person having written authority from the registrant."

At page 25 of the petition we find that the Act did not "place limits on the sources from which local boards may seek information as a basis for classifying a registrant." Again we find a situation clearly indicating the manner in which the panel functions.

The Local Board never made any request for the services of the panel but as the petitioner, at page 6 aptly expresses it, "In April 1944, the Director of Selective Service for New York City undertook a review of Horowitz' selective service file" etc.

On May 10th, 1944 the Chief of the Legal Division wrote the Local Board that "the panel voted to recommend that registrant's status does not warrant his classification in Class IV-D (Pet., p. 7). This communication was probably received the following day, May 11th, and *on the same day* the Local Board reclassified him 1A.

Pursuant to the regulations, petitioner was accorded a hearing by the Local Board, and the latter called in and obtained the services of Rabbi Henry A. Schurr, probably the outstanding and best known Rabbi in Bronx County,—the county in which the Board is located. As a result of his examinations respondent was reclassified IV-D on June 1st. However, further communications from headquarters were received together with advice and on August 10th, he

was again reclassified 1A. Advice from and recommendations of the Headquarters panel may be followed by the Local Board, but not that obtained from one of its own choosing, irrespective of the high standing, character and integrity of its source.

At page 27 petitioner in support of the panel states "In dealing with individual claims to classification in IV-D the boards, as in Horowitz' case, have called in a minister of religion of the particular faith involved to advise the Board concerning the religious aspects of the case."

He failed however to call to the attention of this Honorable Court the fact that Headquarters and the Panel nullified the result of that advice in a few weeks.

The Levy Opinion (149 Fed, (2) 338)

The procedure and communications in the *Levy* case were practically the same as in the case at bar. The Court held at pages 341-342:

> "We hold that even though that practise be proper, it must be limited by two conditions, neither of which were here fulfilled: the personnel of the 'panel' must be disclosed to the registrant so that he may effectively challenge it; and the answers must be limited to ecclesiastical questions. Such 'panels' are properly helpful to local boards only upon subjects as to which the boards need specialized information; they must not be made a substitute for the boards themselves. Despite any categorical form in which their opinions are received, they have only the function of expert witnesses, who like them give their opinions. It seems to us fundamental to any fair trial that, like all other witnesses, their identity must be disclosed to the person whose liberty their testimony is to affect. Unless he knows who they are, it is impossible for him to show what biases or predilections may move them, or whether they have that acquaintance with the subject which alone makes

their testimony competent at all. Furthermore, their anonymity relieves them of the important sanction of publicity which guarantees their impartiality and solicitude, just as publicity guarantees the impartiality and solicitude of the tribunal itself. Nor is there any conceivable excuse for concealment that we can see, unless it be to shield the 'panel' from a criticism, which, if they are to be fit for their task at all, they should be sturdy enough to withstand.

Moreover, even though the personnel of the 'panel' in the case at bar had been known to the relator, and the members had been subject to impeachment and contradiction, the form of their 'recommendation' would still have made it improper for the Board to act upon it. All that we have is the report of the New York Headquarters that: 'After reviewing the file and examining the registrant, and upon consideration of all the circumstances, the panel voted to recommend that registrant's status did not warrant his classification in Class IV-D.' That was not a finding upon an incidental question, as to which the Board lacked an adequate background of acquaintance, and needed help; it was a decision upon the very issue to be decided. The distinction is by no means formal. The relator's exemption, which the 'panel' 'recommended' the Board to deny, depended upon several possibly mediative or constitutive facts: *e. g.*, the standing and character of the Seminary: whether it was abusing its standing by allowing itself to be used by registrants to evade the draft: whether the relator's studies were of a kind that an honest student would pursue: whether he honestly intended to become a rabbi. There may have been others. Upon some of these facts the Board did indeed need help, and we are assuming that it could put questions to a properly constituted 'panel' collectively and did not have to examine them individually as witnesses. But we can find no warrant for asking a 'panel' whether on all the facts it thought the registrant trustworthy; or whether the Seminary was making use of a curriculum, however fair and adequate on its face, in order to evade the draft. Yet it is impossible to know to what extent,

> if any, the general verdict of the 'panel' as we may call it—comprised, and depended upon, answers to just such questions; and insofar as its 'recommendation' in fact did depend upon such answers, the Board could make no use of it without abdicating their statutory duties, and devolving their responsibility. That was no technical irregularity of procedure; it went to the very heart of the controversy and vitiated the whole proceeding."

Every element present in the *Levy* case is present in the case at bar. The personnel of the panel was not disclosed to the registrant. The answers were not limited to ecclesiastical questions. The form of recommendation was exactly the same in both instances.

The decision in the *Levy* case was followed in the Third Circuit Court in the cases before this Honorable Court on this application in an opinion reported in 151 Fed. (2d) 801.

The only other Circuit Court decision on this question is that of *U. S. ex rel. Goodman* v. *Hearn*, 153 Fed. (2d) 186, and referred to at page 24 of the petition as representing "the sounder view." An application for a writ of certiorari in this case has been filed and is now pending in this Court.

We most respectfully submit that the decision of the Learned Court in that case is based upon a misconstruction and misunderstanding as to the law and statutes in this, and other cases of a similar nature. In fact the language and holding in that case is pure dicta and surplusage inasmuch as the Court had already held that "the *decisions* of such local boards *shall be final* except where appeal is authorized" and that the classifications were to be made by the local boards "without interference or review by the courts."

This conclusion is reached despite the overwhelming authority to the contrary contained in decisions of this

Honorable Court and practically every other Circuit Court in the country. Further evidence of the fact that the said Learned Court misunderstood and misconstrued the law on the subject is indicated by its decision in *Harris* v. *Ross*, 146 Fed. (2d) 355, where, at page 358, it was held:

> "* * * the local board had the power and duty to determine from the evidence in the record, from the proofs produced, *and from the extrinsic facts within the knowledge of the board, whether in evidence or not.* In the absence of such facts as were within the knowledge of the board, *but which are not in the record here,* this Court would be in no position to review the decision of the board on the facts even if the Court had the right to review actions which are committed to the discretion of the board." (Italics ours.)

This was tantamount to holding, as the Learned Court later did in the *Goodman* case, that the decision of the local board is final, for in every case in which a review was sought, the Court would be confronted with the fact that the local board was empowered to act on information within its own knowledge, though not contained in the record.

Although the references by the Fifth Circuit Court to the *Levy* case were not necessary for the decision reached, we will direct the attention of this Honoroble Court to a few statements contained therein further indicating that the said Court misconstrued and misunderstood, not only the law, but the facts as well.

It is suggested that in New York City the Panel was proper because of "there being many kinds of religions and ministers and students in that crowded population with which members of the local board might not be familiar." Why in New York City alone? Although numerically the population may be greater the same comparative situation is present in such cities as Chicago, Philadelphia and numerous other cities of the United States, and these local

boards do not seem to have found it necessary to be advised by and receive recommendations from any comparable panel.

Again, we find that "the panel advised that the courses of study taken were not a safe guide to the intentions of the students" etc. Knowledge of a religion in turn, is not "a safe guide to the intentions" of a student preparing for the ministry in such faith. "Intentions" can be judged by laymen as well, if not better.

The intention of one to become a minister of religion is best judged and is based, in large part, upon his honesty and integrity. "Experts" on religious matters are no better qualified to judge these qualities than a layman. True, as to knowledge of ecclesiastical matters connected with their religion, they are in a better position to determine and advise with respect to the knowledge possessed by the registrant on such matters,—which undoubtedly inclined the Court in the *Levy* case to hold that "the answers must be limited to ecclesiastical questions." Reference to the registrant's Selective Service file herein will disclose hardly a single question having to do with ecclesiastical matters. On the contrary, a mere reading of the examination conducted by the Panel shows a determined and vigorous cross-examination in an effort to justify the panel's conclusion "that registrant's attendance at the seminary has been motivated by the desire to secure a basis for exemption from training and service under Selective Service Law (Pet. 10, 11).

And we further find in that opinion that "the regulations require that such outside information be put in writing in the file where the registrant may see and explain or deny it. That was all done in this case."

Disregarding its own holding in *Harris* v. *Ross*, made shortly before, that the local board may classify a registrant on information not contained in the record, it in

turn disregarded the fact that the same damaging "confidential" communication was contained in the file before it. This "confidential" communication contained "opinions" etc. which were not in the file and the registrant could not see it so as to "explain or deny it."

Without taking any issue with respect to the statement that Goodman knew some members of the panel, suffice it to say that he was finally classified 1A on January 30, 1945 and it was not until February 12, 1945 that the local board for the *first* time received from Selective Service the names of the members of the panel, and then as the communication stated, and the record shows only "for the information of the local board" (R. 188).

CONCLUSION

The application for a writ of certiorari herein should be denied.

~~In~~ Not urging that the opinion in the *Levy* case represents the "sounder view," may we borrow the language of the Learned Third Circuit Court in the instant case:

> "We fully agree with the conclusion reached by the Circuit Court of Appeals for the Second Circuit that the interjection of the statement and recommendation of the 'advisory panel' into the proceedings of the local boards vitiated those proceedings and rendered the relators' reclassification and induction invalid. The reasons for this conclusion are stated in Judge Learned Hand's opinion in the cited case with such clarity and force as to require no amplification by us."

Respectfully submitted,

MEYER KREEGER,
Counsel for Respondents.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 58

GENERAL W. W. EAGLES, Post Commanding Officer, Fort Dix, New Jersey,

Petitioner,

v.

UNITED STATES *ex rel.* HARRY HOROWITZ

No. 59

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UNITED STATES, *ex rel.*, JACOB S. SAMUELS

BRIEF FOR RESPONDENTS

MEYER KREEGER,
Attorney for Respondents.

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BRIEF FOR RESPONDENTS

Statement

On the 2nd day of November 1941, Local Board No. 104 in New York City classified the respondent Horowitz

IV-D (student preparing for the ministry) under the Selective Training and Service Act of 1940, and he retained such classification for more nearly three years thereafter. Following the *recommendation* of a "Panel on Theological Classifications" the local board on May 11 and again on August 10, 1944, changed such classification to 1A, and respondent was thereafter inducted into the armed forces of the United States on February 15, 1945. He was sent to Camp Dix in the State of New Jersey, and a review of such classification and induction was sought through writ of habeas corpus issued out of the United States District Court for the District of New Jersey. After a hearing thereon before Honorable Thomas F. Meaney, U. S. D. J., on April 16, 1945, said writ was ordered dismissed on May 14, 1945.

On appeal from said determination, the United States Circuit Court of Appeals for the Third District reversed the lower Court and on November 15, 1945, ordered the writ sustained (151 Fed. (2d) 801). On application of the government to this Honorable Court a writ of certiorari was granted, and an order was filed thereon on May 27th, 1946.

Though the actual facts in the Samuels case naturally differ from those in the Horowitz case, they are, with one exception that will be particularly referred to herein, similar insofar as the pertinent questions on this appeal are concerned.

In addition to some of the facts which were before the local board, petitioner has made a number of references,—(1) which are nowhere contained in the record; (2) were not before the local board; (3) of which the respondent had and could have no knowledge, and (4) none of which is even supported by any authority other than alleged information received by the writer of the said brief. Further, pertinent and vital matters affecting

the said "panel" though contained in the record, have been completely omitted.

To avoid repetition these matters will be referred to and discussed later in this brief.

Questions Presented

At page 25 of its brief the government states that "the City Director found it desirable to establish the Theological Panel". There is no evidence in the record on this subject but for the purpose of this appeal it may be assumed to be the fact.

The language of the "question presented" at page 2 of said brief might indicate that the only question before this Honorable Court is whether or not recommendations made by the said panel are proper. However, one of the major issues presented is the propriety and legality of the creation of the panel itself, and as set forth under its argument in the said brief, at page 22,—"whether there is legal foundation for the establishment in New York City of an Advisory Panel on Theological Classifications".

POINT I

The "Panel", the various steps taken by the Local Board, the Appeal Board and by New York City Selective Service Headquarters in connection therewith, the examination of the registrant by the Panel through its members, its recommendation and the communication of the same to the Local Board were each and all illegal and without any warrant in law.

The Local Board had classified the registrant IV-D which classification he retained for close to three years. City Selective Service Headquarters then requested that

his local board file be forwarded to it and the same was turned over to the panel, and the registrant ordered to appear before it, to be there examined. The examination having taken place, Selective Service Headquarters transmitted the file and a transcript of the examination to the Local Board together with a recommendation "that registrant's status did not warrant his classification in Class IV-D". (Letter in file dated May 10, 1944.)

We have been unable to find either in the Selective Training and Service Act of 1940 or in the rules and regulations promulgated in connection therewith any authority for the creation of a panel of this nature.

It appears from the opinion in *U. S. ex rel. Rubin* v. *McGruder etc.*, 55 F. Supp. 947, that

> "Lt. Colonel Durham testified that there was nothing in the Act providing for a theological panel or authorizing such a body as was used in the instant case; *that it exists only in New York* and was created by New York Headquarters to assist boards and advise them in cases involving divinity students." (Italics ours.)

There is nothing to indicate who created the panel, how it was chosen, the number of its members, who they are or who its chairman may be, if any; who, or how many sit on a case, whether a quorum is required, what the vote may be, unanimous or otherwise, and other elements too numerous to mention.

Selective Service Headquarters does not even permit the names of those present or the names of the person or persons who conducted the examination to appear on the transcript. And the transcript is not even signed by a member or anyone else.

They give no reasons for their decisions, no basis for their opinions, and sign their names to nothing.

All we know is that it carries the impressive and dignified title of "Advisory Panel on Theological Classifications."

May we adopt the language of a comment made by Hon. GROVER M. MOSCOWITZ, *U. S. D. J.*, in a similar case (*U. S. ex rel. Isseroff* v. *Cain, etc.*, Misc. 888) at a hearing before him months *after* the panel proceedings in this case:

> "If these men are willing to serve, they ought to be willing to stand up and be counted. That is our American method."

Again, search as one will, and no authority can be found to justify the registrant's appearance before and examination by any person or body other than the Local Draft Board and/or its members.

Section 632.1 of the Selective Training and Service Act regulations, subdivision (b) thereof, provides:

> "It is the Local Board's responsibility to decide in the first instance the class in which each registrant shall be placed."

And there is an express direction with respect to divinity students covering this question, specifically provided for in Local Board Memorandum 187. Section 1, subdivisions a and b, sets forth the requirements necessary for a IV-D classification. Section 2 provides:

> "LOCAL BOARD TO MAKE DETERMINATIONS: The Local Board is charged with the *primary* responsibility of determining whether a registrant * * * fulfill(s) the above requirements of the Act and Regulations." (Italics ours.)

We, of course, recognize that officially it will be claimed that the Local Board decided "in the first instance" the

class in which the registrant was placed, but let us examine what in practice really occurred.

Local Boards were created for the purpose of handling the cases of registrants within their respective immediate areas. Through the medium of appeal boards, applications to Selective Service City Headquarters and appeals to the President, the machinery was set up whereby a registrant who felt that he had been unjustly dealt with by the Local Board or the Appeal Board could apply for relief to those higher in authority. Having this in mind, it is clear why the regulation just referred to provided that the Local Board should make its *own* decision "in the first instance."

The Local Board's 1-A classification in the case at bar was only made *after* the receipt of the recommendation of the panel, which, apparently, was created by City Selective Service Headquarters or its director. The recommendation was received by the Local Board on May 11th, 1944 and the Local Board classified the registrant 1-A *on the same day.*

A court of last resort makes a "recommendation" to one of lower authority regarding a *decision* which the latter is about to render. The decision is made immediately thereafter and follows the recommendation made. How useless, how futile becomes an appeal from that decision to the authority upon whose recommendation the decision was based,—the *only* authority to which a *final* appeal may be taken?

By the creation of this panel and giving it the authority to examine the registrant, to be followed by a finding which the highest authority, the City Director, transmits to the Local Board,—the very purpose of the regulation is defeated.

We are mindful of the fact, that the chief of the Legal Division, New York City Headquarters closed his com-

munication of May 10th with:

> "Of course, while the Local Board should give careful consideration to the recommendations of the Advisory Panel, formal determination of the registrant's classification must rest with the Board itself or the appropriate appeal agency."

But we also realize that discretion is still the better part of valor. It seems inconceivable that the lay members of the Local Board would do other than follow the "recommendation" of its superior officers at City Selective Service Headquarters, the latter having received the said recommendation from *its own* "advisory panel on theological classifications composed of eminent clergymen and laymen", all of which the writer took pains to incorporate in the said communication. It will appear herein and the record now shows that *no* clergyman "eminent" or otherwise, was even present.

Repeated efforts were made by the registrants to restore the IV-D classification but to no avail. What else could have been expected from the *final* appeal authority which had recommended the classification complained of!

With the exception of certain elements which will be particularly referred to herein the situation here is analogous to that which existed in the Levy case. At pages 24 and 25 of his brief in the United States Circuit Court of Appeals for the Second Circuit, Levy, referring to the "Statement", submitted that there were "two pages of gratuitous opinions, statements and arguments, each and all of them highly prejudicial, without even a suggestion offered to support them, and without a scintilla of evidence in the file of any kind upon which they may be based.

"So we now find that Selective Service Headquarters (in New York City alone) not only has an advisory panel

which makes recommendations, but it has an official connected with it, whose duty it seems, is to interpret those recommendations, and having interpreted them, to communicate the same to the Local Board.

"Not even a careful scrutiny will disclose the name of Knowlton Durham among those regarded as authorities on Orthodox Jewish religion, tradition, customs and its institutions; still, as far as this case is concerned, the contents of this communication is all that the government offered on those subjects." (Colonel Durham had signed the Statement.)

Comparisons are oft times odious,—and the writer hopes that this Honorable Court will not deem him presumptuous if he suggests that the procedure followed in this case would be comparable to that of a trial court which, having a case before it, had delivered to it in advance of its own decision, the opinion of an appellate tribunal with respect to its merits.

The Solicitor General constantly attempts to justify the creation of the Panel by referring to the Board which hears cases of conscientious objectors; in fact he devotes a large part of his brief to that effort. For the same purpose he refers to "Industrial Advisors", "County War Boards", "War Industries Board" and numerous others.

In every instance these boards were created by express statutory authority and their duties and limitations were clearly provided for.

The Solicitor General recognizes the well defined distinction which exists,—does so by his naive suggestion at page 36 of his brief where he states that "Apart from the fact that the theological panel was created by the City Director rather than directly by Congress, we perceive no basis for distinguishing between the conscientious objector cases and these cases." That should be sufficient.

At page 37, the Government in a footnote states that provisions of the *Conscientious Objector Statute* "embody a compromise plan worked out between representatives of various religious organizations", etc. In view of the fact that no plan was "worked out", etc., with respect to the panel, much less any statutory authority for its "provisions" the *carefully worded* footnote at page 45 of the Government's brief is worthy of attention. It there appears that "we are advised by the Selective Service System", "that the members • • • of the panel",—*not the panel,* its creation, procedure, the acts of the City Director and others at headquarters in connection therewith,—but the "members have received the endorsement" of various Jewish religious organizations.

In a further effort to justify the creation of the panel, the government at page 39 attempts to draw an analogy between it and "industrial advisors to the district boards" in the first World War. As appears at page 64 of said brief this was done pursuant to section 80 of the Selective Service Regulations. It was specifically provided that "there shall be appointed by each District Board three persons to be known as industrial advisors to the district board. • • • Such advisors shall have the right to furnish all pertinent information to the district board", etc.

In addition to the fact that "industrial advisors" acted pursuant to statutory authority only, and the "panel" does not, it was provided that the former "shall have and exercise only the rights, duties, powers, and functions herein specifically given"; that they acted only *"upon request of the board to which they are attached"*, and the "information • • • will supplement the information in the possession of the district boards", etc. (Our italics.)

City Headquarters did not direct their activities, interpret their actions, request the reopening and reconsideration of registrants' classifications following such

actions, send letters to the District Boards regarding the same and there was nothing concealed or secret about their work. They were not authorized to present any arguments pro or con, confidential or otherwise and performed *only* the duties specifically prescribed by the statute. (See Points II and III.)

The list of agencies referred to at pages 39 and 40 of his brief should suffice to convince him of the legal distinction present. One of them was created as late as January 2, 1946. "Attacks on the panel" (this brief, p. 13), its propriety and legality have been made in the Courts for a number of years now, and the United States Circuit Courts of Appeals for the Second and Third Circuits have declared acts of the panel unauthorized and illegal. As each of said agencies was created, so could a "Theological Panel" be authorized if Congress or the authorities at Washington thought it advisable and proper. Regulations with respect to dentists and other professional men have been incorporated in the Selective Service Law and its regulations, and that is the only reason why such boards and/or agencies are recognized as such and are permitted to function.

At page 39 we find another unwarranted statement purporting to show why the "Director of Selective Service did not formally authorize the creation of the panel". In the absence of, and inability to find a better excuse, it is sought to justify the panel because of the "Jewish problem" in New York City. Chicago has gone through the war without the aid of a panel, and so has Philadelphia, Detroit, St. Louis, Boston and numerous other large cities.

Section 603.1 of the regulations provides that the *National Director* of Selective Service "is responsible to the president" and is authorized and directed among other things "(a) to prescribe such amendments to these regu-

lations as he shall deem necessary." If the panel is so important to the City Director, just *why has he not attempted to have it authorized?*

See *U. S. ex rel. Levy* v. *Cain*, 149 Fed. 2d 338, and the opinion below. The authorities will be referred to in detail under the Points following.

POINT II

The conduct, actions and operation of the Panel and of City Selective Service Headquarters with respect thereto are in violation of the fundamental rules of law and justice.

At page 45 of its brief, the government urges "• • • there is nothing secret about the panel. Indeed, an administrative purpose to conceal the identity of its members, which is what respondents seem to argue, is hardly compatible with the plain purpose of the panel."

That appears to be a strong argument in support of the proposition that there should be *no* secrecy with respect to the panel activities and that there should be *no* concealment regarding the identity of its members.

In at least a dozen instances, and covering many pages of said brief, we find that if the respondents "desired to know the names of the persons" (panel members) • • • "they need only have asked"; that "information is available to any registrant who takes the pains to request it" (B. p. 21); the "information • • • would have been readily available to them if they had sought it" (B. p. 23); • • • "if inquiry had been made the information would have been forthcoming" (B. p. 43). • • • "there is nothing secret about the panel" (B. p. 45); and "Respondents • • • failure to do so" (request names of panel of members) "suggests that the point which they now make is a mere afterthought" (B. p. 46).

These statements are not only unjustified but represent absolute misstatements of the facts themselves; and in proving them as such, we feel convinced that the Solicitor General and the attorneys associated with him in Washington were not informed by New York City Selective Service Headquarters of the true facts, and were not aware of them.

Unfortunately the actual record herein omits much of the discussion, colloquy and argument which took place at, and on the hearing of the writ. Further, the writer will not offer any information not contained in the record, for which reason he will not recount the numerous conversations which he had with responsible authorities at New York City Selective Service Headquarters with respect to this subject matter. Fortunately however, contained in the files of the United States District Court for the Eastern District of New York is indisputable proof of the falsity of the premises sought to be urged by the government herein.

Under date of *May 2nd, 1944,* following registrant's appearance before and examination by the panel, an "extensive report" *supposedly authored by the panel,* was sent by City Headquarters to the local board which purports to set forth the panel's *"conclusion that registrant's attendance at the seminary has been motivated by the desire to secure a basis for exemption from training and service under the Selective Service Law".*

This "extensive report" not only fails to disclose the signature of the panel as a whole or any member thereof, *but is in fact unsigned.*

Four months *after* the last mentioned date, at a time when the panel had completed its work with respect to these respondents, we find that in *United States of America ex rel. Isseroff* v. *Cain, Commanding Officer, etc.,* that the identical questions here at issue were before

the Court on a writ of habeas corpus. The papers in that case are on file in the office of the Clerk of the United States District Court for the Eastern District of New York and are marked with the Clerk's Official designation, M-888.

An examination of that record will show that on the hearing of the writ which took place on September 6, 1944, the following statement was made by Mr. Parker representing the United States Attorney:

> "• • • in the past—this is about the fifth case we have had—there have been attacks upon the Panel. *The Government in the past did not wish to disclose the names of the members of these panels, but, on account of the attacks,—*
>
> The Court: I don't see any point to it. *If these men are willing to serve, they ought to be willing to stand up and be counted. That is our American method.* You have no objection to it, yourself?
>
> Mr. Parker: Well it has come to that pass that I think I should take that step." (Italics ours.) (Stenographer's Minutes, p. 7.)

It might be well to call to the attention of this Honorable Court that though these cases were inaugurated in different Court jurisdictions all three originated in New York City *by reason of the actions of the same authority,*—New York City Selective Service Headquarters. Up to the time of the Isseroff case, inductees were sent to Camp Upton, Long Island, which is within the jurisdiction of the United States District Court, Eastern District. Shortly thereafter they, including these respondents, were sent to Fort Dix, New Jersey, which is within the jurisdiction of the United States District Court for the District of New Jersey.

In an effort to bolster its position and add color to its claims that the "information is available to any registrant

who takes the pains to request it", etc., we find, at page 12 of the government's brief that "On February 12th, 1945, New York City Headquarters wrote to the appeal board and also to the local board, a letter containing among other things, the names of those who were present at the hearing", etc.

First,—it will be seen that this was "for your information", *i.e.*, the local boards. Second,—let us look at the date on which the names were sent,—February 12, 1945,—ten months *after* the panel examination, and nine months *after* the local board's receipt of the alleged report thereon.

Upon receipt of the Panel "recommendation" from City Headquarters, on May 11th, 1944, the local board changed respondent's classification from IV-D to 1A, *on the same day.* That again, was nine months *before* this "name" letter was written, and the file shows numerous efforts made by the respondent during those nine months to have his IV-D classification reinstated.

With every step taken and every administrative remedy exhausted by the respondent, he received his notice of induction. *With the case closed,* City Headquarters *then,* and only three days before his actual induction, on February 15th, 1945, mailed for the first time, these names "for your" (the board's) "information". The attention of the Court is most respectfully referred to the fact that this was over five months *after* the Isseroff case,—after it was admitted in open court that in the past "the government • • • did not wish to disclose the names of the members of these panels" etc.

Now let us next examine the "transcript of testimony" taken before the panel. Does it bear or indicate the names of those present? No. It does not even disclose the name of the panel member who conducted the examination!

In *United States ex rel. Levy* v. *Cain*, 149 Fed. (2d) 338, at pp. 341-342, the United States Circuit Court of Appeals for the Second Circuit said:

> "It seems to us fundamental to any fair trial that, like all other witnesses, their identity must be disclosed to the person whose liberty their testimony is to affect. Unless he knows who they are, it is impossible for him to show what biases or predilections may move them, or whether they have that acquaintance with the subject which alone makes their testimony competent at all. Furthermore, their anonymity relieves them of the important sanction of publicity which guarantees their impartiality and solicitude, just as publicity guarantees the impartiality and solicitude of the tribunal itself. Nor is there any conceivable excuse for concealment that we can see, unless it be to shield the 'panel' from a criticism, which, if they are to be fit for their task at all, they should be sturdy enough to withstand."

The government, at page 46 of its brief, undoubtedly recognizing the force of these truths attempts to evade it by suggesting: "Apart from the fact that the panel scheme rests in part upon the community's recognition of the high caliber of its membership, there is little likelihood that the identity of persons as prominent in the religious public life of New York City as are the members of the panel could be concealed even if such a purpose be assumed."

Not only is it a fact that the names *were* successfully "concealed" but the record shows *conclusively* that it was their desire to have them so "concealed". At page 8, the government sets forth in its brief part of the "report" sent by City Headquarters to the local Board following registrant's said appearance before and examination by the panel. It is there referred to and captioned as a "statement for the record".

Though the governm. nt insists "that there is nothing secret about the panel",—when this Honorable Court reaches that exhibit it will find that not only were the names kept secret, but vital subject matter as well; that the word "CONFIDENTIAL" precedes the word "statement", and that the caption on the said exhibit actually reads:

"ADVISORY PANEL ON THEOLOGICAL CLASSIFICATIONS
CONFIDENTIAL STATEMENT FOR THE RECORD"

It is a far cry from the government's assertion that "the panel scheme rests in part upon the community's recognition of the high caliber of its membership" etc. to one which discloses that the panel conducts its hearings in anonymity; its conclusions and the reasons therefor, based on fact or otherwise, are unsigned, its recommendations unauthored, *and the local board is directed to keep the same "confidential" in its entirety.*

In substance, the members of the panel make a "recommendation" that the registrant's status be changed from IV-D to 1A, and accompanies it with pages of *argument* why such change should be made; they refuse to disclose their identity *even to the local board,* and then *direct* the local board *to withhold the alleged reasons and arguments contained therein from the "community", including the registrant.*

No,—the only thing that they did not wish to do was to inform the registrant, much less the community, of the nature or details of their activities.

The writer has been attorney or counsel in a dozen of these matters, and despite the fact that "there have been attacks upon the panel" etc. (p. 13 of this brief) there has not been a single instance in which a member of the panel has ever appeared in an effort to justify the "statement for the record" "confidential" or otherwise.

Being "confidential" the registrant never saw it until *after* he was actually inducted, *and then only,* if a writ were obtained, and his file brought into Court.

POINT III

Consideration of any matter not communicated to the registrant is in absolute violation of the statute.

Even the Solicitor General subscribes to *this* proposition for at page 41 of his brief he submits that "So long as the information * * * is placed in the file, *where the registrant may examine it and reply to it,* we think it is immaterial" where the information is obtained (italics ours).

It seems needless to further comment on the government's omission of the word "confidential" in its reference to the "Statement for the Record". With that fact established, it is most respectfully submitted that the said "statement" sent to and received by the local board constituted a violation of Regulation 605.32 of the Selective Training and Service Act of 1940 which provides that

> "No information shall be confidential as to * * * (1) the registrant, or any person having written authority from the registrant."

This "confidential" statement reads like an animated argument against the registrant concluding with what might well be termed an order to the local board to change his classification to 1A.

The file *now* discloses, properly or improperly, that three members of the local judiciary constituted the panel.* It would seem hard to believe that even laymen would transmit such a communication to the local board and request that information with respect thereto should

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* Though the communication of May 10th sent to the local board stated that the panel which recommended that registrant's status does not warrant "4D classification was composed of *eminent clergymen* and laymen", it was not until the case was closed and then only three days before actual induction that headquarters wrote the local board that "* * * none of the panel's rabbinical members were present at the hearing in question" etc.. (Letter of February 12, 1945.)

not be communicated to the person affected. It seems inconceivable that men trained in the law and elevated to judicial position could write unsigned pages filled with highly prejudicial matter and vital to the interests of the person affected,—practically ordering that the local board change its own decision,—and caption the same "confidential".

Quasi judicial in its nature, duties and functions, the local board is presented with a powerful, forceful document containing arguments with respect to alleged historical and religious tradition, unsupported by any authority or evidence, for the sole purpose of having that body change its decision, and carrying with it the admonition not to inform the registrant of the reasons for the change.

Without any attempt at "flag waving" this procedure bears a striking resemblance to some of the practices indulged in by our recent enemies.

Time and again the government refers to statements of or by the panel, and at page 8, particularly refers to the "Statement for the Record", dated May 2, 1944, which had been "prepared by the advisory panel" (the "confidential" statements). There is no evidence or even a suggestion either in the testimony taken at the court hearing or contained in the file to support this statement. All that the record shows is that though the letter is dated May 2nd it was not sent before or with the letter of May 10th (letter with recommendation), but was sent on June 5th *after* Rabbi Schorr's IV-D recommendation. The date May 2nd was not an arbitrary one. *That was the date of the panel hearing,* and though mailed over a month later, that date might readily give color (to the local board at least) to the suggestion, if not the thought, that it was prepared *by the panel* on the date of the hearing.

We have no way of knowing whether or not the panel is really responsible for the form and language of the

communication itself. The records of our Courts will show, that with the exception of the particular facts relating to this registrant, letters, almost identical in language, were sent in the past in all similar cases. For instance in *U. S. ex rel. Levy* v. *Cain, supra,* the letter was *sent and signed* as were the others, by "Knowlton Durham, Chief Legal Division" (Record, Levy case, pp. 111-113). The main difference in *language* is that Levy's "attendance at the academy in question was prompted by extraneous considerations." In the instant cases the "registrant's attendance at the seminary has been motivated by the desire to secure a basis for exemption from training and service under the Selective Service Law."

In the Levy case the communication was *not* marked confidential and the opinions and statements therein were *not* attributed to the panel.

At pages 7 and 8 of this brief we submitted to this Honorable Court *part* of the criticism of these practices, presented to the United States Circuit Court of Appeals for the Second Circuit, in the Levy case

This followed earlier court "attacks on the panel", and, after that there were *no more* letters signed by the Chief of the Legal Bureau, and from then on, they bore *no* signature at all. However identical statements have since been attributed *to the panel,* but marked "confidential."

We think it quite significant that at no time, in any of the cases in which the writer has appeared, has a single witness, panel member or other, been produced by the government in support of any statement, opinion or argument contained in the "confidential statement for the record."

In addition to its being "confidential" the local board was *directed* that "the statement should be added to the registrant's file *and considered* together with the other information of record *in determining the registrant's*

classification" (our italics), despite the fact that

> "No information shall be confidential as to * * * the registrant" etc.

Is it possible that the eminent gentlemen who were members of this panel, as well as the Chief of the Legal Division at City Headquarters, did not know that they were violating the provisions of this regulation? And when they sent this "confidential" communication "to be considered * * * in determining the registrant's classification", did they not know that they were also violating Section 623.2 of the Selective Service Regulations which provides

> "* * * *Under no circumstances* should the Local Board rely upon information received by a member personally unless such information is reduced to writing and placed in the file"? (Italics ours.)

We know that it was "reduced to writing and placed in the file". But we also know, that once there, the statute provided that the registrant was entitled to see, read and examine it, and that it was a violation of the law to withhold it from him. Irrespective of the express provisions with respect thereto, and granting that they did not know of them, it seems incredible that three members of the judiciary and the Chief of the Legal Division would not know that such procedure violated the cardinal, fundamental and underlying principles of justice.

It seems inconceivable that they would not realize, as was said in *Interstate Commerce Commission* v. *Louisville and Nashville Railroad*, 227 U. S. 88, at page 93, that:

> "* * * Manifestly there is *no* hearing when the party does not know what evidence is offered or considered, and is not given an opportunity to test, explain, or

refute. * * * for otherwise, even though it appeared that the order was without evidence, *the manifest deficiency could always be explained* on the theory that the commission had before it *extraneous, unknown* but presumptively sufficient information to support the finding." (Italics ours.)

POINT IV

The actions and conduct of City Headquarters and/or the panel were coercive and registrant's 1A reclassification does not represent the local board's own decision.

As has been pointed out, classification of a registrant is the responsibility of the local board; and, with respect to divinity students, a *special* provision makes it the primary responsibility of the local board to determine whether or not a registrant fulfills the requirements of the Act.

On May 10th, 1944, *eight days after* the date of the "confidential statement', Selective Service Headquarters mailed to the local board a copy of the "transcript of evidence" taken before the panel and a letter stating that it had "voted to recommend that registrant's status did not warrant his classification in Class IV-D". *On the very day of its receipt,* May 11th, 1944, the Local Board reclassified the registrant 1A.

Requesting a hearing thereon pursuant to the provisions of the statute, the entire case and file were referred *by the Local Board* to Rabbi Henry A. Schorr, the most prominent and outstanding rabbi in Bronx County,—in which County the local board is located,—for an "advisory recommendation". After a study of the case and a personal examination of the registrant, he recommended a IV-D classification and the local board so reclassified him on *June 1st, 1944* (R. 27, 28).

Let us keep in mind that for three years the local board did not feel that it needed any advice in the matter and that in the first instance, the file was sent to, and the panel proceedings, etc., were had at the City Selective Service Headquarters *at the request of the latter.**

Two months after Rabbi Schorr's recommendation, *August 10, 1944*, registrant received a "notice to come down to the board * * * and was told I would be put in 1A" (R. 28).

Pages seven to twelve of the government's brief are devoted entirely to the printing of the letter containing the "panel recommendation" and "a statement for the record" (p. 8) which now appears as the "Confidential Statement for the Record". Then follows what purports to be a history of the proceedings down to the time of induction. Immediately following its reference to the IV-D classification of June 1, 1944 recommended by Rabbi Schorr, the government refers to a local board hearing as a result of which "Horowitz was again classified 1A" (pp. 11-12). No mention is made of anything that occured in the meantime or *what brought about the final 1A reclassification.*

The fact is that between those two dates the Chief of the Legal Division at City Headquarters wrote two very important letters to the Local Board, neither of which is referred to at this or *at any time by the government.*

Learning of the IV-D classification *of June 1st*, the Chief of the Legal Division *on June 5th* immediately

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As early as July 31, 1943 the City Director had sent a bulletin to the local board regarding the panel to the effect that it " * * may submit *doubtful* cases to this headquarters for advisory opinions by the panel". This bulletin also applied "* * * to cases *already classified in which there has been some question of doubt*" (Government Brief, p. 27) (our italics).

wrote the local board,—"enclosed herewith is a copy of the Confidential Statement for the Record of the appropriate division of our Advisory Panel on Theological Classifications in the above matter".

The recommendation of May 10th, 1944 had brought about the desired result forthwith. *When the local board's own choice of a rabbi* resulted in the IV-D classification, the "Confidential" statement was deemed immediately necessary; and City Headquarters again obtained the registrant's local board file "for further administrative review", undoubtedly with respect to Rabbi Schorr's "advisory recommendation".

Not finding anything to actively complain of in that respect, the Chief of the Legal Division on *July 29th, 1944*, wrote to the local board: "Enclosed herewith, is a communication from the College of the City of New York indicating that in 1936 the registrant stated that his vocational preferences were '(1) rabbinate (2) teaching' and in 1937 it was (1) teacher (2) rabbi." The letter closes with:

> "In view of the importance of the question of intention in the present case (see our letter of June 5th) it is requested that the Local Board reopen and reconsider the registrant's classification of June 1st in the light of the additional information presented and advise this headquarters of the action taken in the matter."

"Our letter of June 5th" was the one which contained the "Confidential Statement for the Record". It was following the receipt of *this* letter that the Local Board again changed the classification from IV-D to 1A.

The July 29th letter was the subject matter of a significant incident which occurred *at the hearing on the writ.* Counsel sought to refer to the same to show that the

change in classification from IV-D to 1A followed a "request" by City Headquarters that "the Local Board reopen and reconsider the registrant's classification of June 1st", and at the same time requested the local board to refer to the "confidential" statement.

He requested production of the same and the United States Attorney in answer to a question by the Court stated "I don't remember seeing a letter to that effect, sir, in the file". The Court then ordered a recess for three minutes to "see if you can find it" (R. 33). The recess, and an entire page of colloquy between Court and counsel, failed to produce the letter. Registrant had made a copy of the same from the file at the local board prior to the time of his induction (this letter was not marked "Confidential") and counsel started to read it. It was only then, that the U. S. Attorney announced "Mr. Agress had it when I asked if there was such a letter" (R. 33, 34).

Who is this Mr. Agress that he could have this letter in his pocket, whereas registrant's counsel was only permitted to see the file "under the supervision of Lieutenant Lathrop who did not move from my side" (R. 35). The answer may shed considerable light on many unanswered questions in this case, as well as the fact that on occasion, documents favorable to a registrant do not even reach his file until after final classification by the local board.

Though the printed record herein is barren in this respect, again, fortunately, there is an official Court Record which furnishes the answer. In *United States of America ex rel. Goodman* v. *Hearn, etc.*, a similar question was involved and the Transcript of Record in that case was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit on the 26th day of October, 1945. The writ had been

heard at Macon, Georgia. The page references following are to the said Transcript of Record:

At the opening of the case, counsel for the government stated that he had a witness from New York who would arrive shortly (R. 32), and the court was later informed that "he is with the Selective Service Board" (R. 114). Having "just come in" government counsel felt it necessary "to talk with him before we go into the cross examination" of the registrant (R. 74), and, it later appeared, that his name was "Mr. Agress * * * who is now in Court" (R. 108).

When he was not called, the writer, at the close of the testimony, asked government counsel "You are not going to use the man from New York?" he replied, "No, sir, you can use him if you want to * * *" (R. 114).

The record shows that when it was necessary to obtain any information about the panel, Mr. Agress was the man to see; when it was sought to ascertain why important communications from the seminary had ("through inadvertence") not been sent to the Local Board, Mr. Agress was the man to see; and though not a member of the Panel he was present ("at the session") (R. 72, 73, 74, 108, 109).

"You can use him if you want to" was not accepted, as the writer felt that he was entitled at least, to the latitude enjoyed by the examiner at the panel hearings where,—who wrote certain letters, statements and opinions, and why,—could be inquired into; where the *accuracy* of their contents could be examined, and inquiry made as to whether or not there was any proper basis or support for the same; why *prior* to the writer's appearance in the matter the said statement (on the first hearing) was marked "confidential" but subsequent thereto, and after the second hearing, they were not so marked; what his functions are with respect to both the panel

and the legal bureau; *and why the seminary letter transcript and recommendation were "inadvertently withheld from the local board prior to the classification of January 30, 1945"* (Gov. Brief, p. 39). Having been present at the Panel hearing (R. 108) he could have given *evidence* as to the "registrant's demeanor" (R. 183, 184) with respect to which the record is absolutely barren; and, perhaps, the reasons why and upon whose advice that appellant was the last or one of the last to be inducted on that day, and given orders to leave the jurisdiction of the Court within thirty-five minutes, so that it was finally necessary to obtain the writ in Georgia instead of New York City (Goodman reply brief, pp. 82, 83).

Knowing Agress, we did not accept the offer because we also knew that if we called him we would be *bound* by *any* answers he might give, and that if they did not square with the facts, any effort at further examination with respect thereto would be met by the objection that we could not impeach our "own witness".

The record of course, does not show *who* changed the U. S. Attorney's mind about calling him as a witness, after being brought from New York City for that purpose.

The communications in that case which were "inadvertently withheld" (Gov. brief, p. 39) and did not reach the local board until *after* the registrant was finally classified and about to be inducted, consisted of a letter from Samuel L. Sar, Dean of the Rabbi Isaac Elchanan Theological Seminary, "the leading orthodox rabbinical seminary in the western hemisphere" (R. 191); the transcript of an examination of the registrant conducted by him, Rabbi Soloveitchik, Senior Professor of Rabbinics at, and Dr. Samuel Belkin, President of, the Seminary; and a "decision" which "unanimously recommended to the Panel on Theological Students for a classification of 4D", which was signed by all three.

At the time of the hearing herein, with respect to the July 29th letter there was nothing to indicate what might have motivated the Board in again reclassifying the registrant, and particularly there was nothing to indicate that immediately before so doing the Board was "requested" to reopen and reconsider the IV-D classification and in so doing to refer to the "Confidential Statement for the Record". It seems passing strange that this important letter could not be found until produced from Mr. Agress's pocket. Without any severe stretch of imagination we are impelled to think of some of the unanswered questions in this case, such as why the names of the panel members do not appear on the transcript, and why the examiner's name particularly does not appear thereon; why almost identical "statements for the record" were originally signed by the Chief of the Legal Bureau, and after criticism in and by the courts these statements were then unsigned; why, since they have been sent unsigned they have been attributed to the panel,—and finally wh they then became "confidential".

At the hearing on the instant writ it appears at R. 28 that in a conversation with members of the local board registrant was personally "told that while these people would have been satisfied to keep me in 4-D classification, they had had continual notices from headquarters concerning me and they didn't want to have any more discussions about it, and they decided to put me in 1-A"; and at R. 33 "they would have been satisfied to accept their opinion which they gave as a result of Rabbi Schorr's letter, but that they had received a communication from headquarters which was forcing them to do otherwise".

Is it not fair to assume that if the last 1-A classification was the result of the considered judgment of the local board or its members that the government would have had at least one of them at the hearing to so testify?

Is it not fair to assume that if the local board and its members had not told the registrant that they wanted him to retain the IV-D classification, that "they had continual notices from headquarters" and they had received a communication from headquarters which was forcing them to do otherwise,"—that the government,—surely Agress, would have had one of them in Court to deny such testimony?

In the *Goodman* case at Macon, Georgia, Agress informed the United States Attorney that the members of that board could not be present because "we attempted to have the board members here, or some of the members, but they are in Court in Chicago" (R. 114). After all, Newark, where the instant hearing was held, is but a few miles from New York.

Conveniently overlooking the fact that the panel was not named by the local board, that its members were not known to it, that they did not live in the community and did not act on the "initiative" of the local board, the government, at page 41 of its brief, submits that "in many instances *as in the Horowitz case* the classifying boards have on their initiative invited advisory recommendations from persons in the community who are specially qualified to assist the boards" (our italics).

Yes, but what happens when it does, and a IV-D "advisory recommendation" is received as a result thereof, and the local board follows *that* recommendation? The Chief of the Legal Bureau at City Headquarters *immediately* sends the local board a voluminous document filled with unsupported statements, prejudicial matter and suggestive innuendo, marks it "confidential", follows with another "requesting" the board to "reopen and reconsider" the IV-D classification, and in so doing, to refer to the "confidential" statement.

We stated at the outset that the government's brief contained statements not in the record. One of these is

at page 27, and is most decidedly unfair, because it refers to records which are not available to the respondent or counsel. They are in the exclusive possession of New York City Selective Service Headquarters. The Solicitor General states that he is "advised by the Selective Service System * * * that as of December, 1945, the Section of the Panel involved in the present cases had recommended in favor of registrant's claim to exemption in approximately 65% of the cases". There is not a word of testimony in the record to this effect and not a suggestion contained in the file as to the subject matter.

There is however documentary evidence in the file of the United States Circuit Court of Appeals for the Second Circuit and in those of the United States District Court for the Eastern District of New York which tends, in cases of Orthodox Jewish registrants, to brand this information furnished to the Solicitor General as unfounded as that furnished to him regarding the panel, its members and the "secrecy" with respect to their names and to the alleged panel "confidential" communications.

In *United States of America ex rel. Levy* v. *Cain, supra,* it appears from the record at page 101 that the registrant in reviewing his case wrote to the Board of Appeal, and among other things submitted:

> "It is about time this Board realized that where a Panel has passed upon fifty students from one seminary all of whom are bona fide students and out of that fifty have recommended a 4-D classification to only one it cannot be said that each case has been examined upon its own merits and a just, fair, and impartial decision rendered.
>
> "Merely because Jewry is divided into three separate and distinct classes, Orthodox, Conservative, and Reformed is no reason why the Conservative and Reformed Jewry should be preferred over the Orthodox

Jewry, and students of these Seminaries be preferred to students of the Orthodox seminaries."

These paragraphs are referred to in full in the opinion reversing the lower court and sustaining the writ (149 Fed. [2d] 338, at 340).

Through this letter was written and placed in that registrant's file in March, 1944, and was offered and received in evidence at the hearing of the writ *two months later* neither the person who furnished the present information to the Solicitor General, a member of the panel, a representative from City Selective Service Headquarters or anyone else ever dared deny the truth of that charge, and we use the word charge advisedly.

At page 47, and at other times throughout its brief, the government urges that the local and appeal boards "*merely* considered an advisory recommendation" (our italics). But is that all that was considered?

On May 10th the "advisory recommendation" was sent to the local board *accompanied by a request* that the original IV-D classification be reopened and reconsidered.

On June 5th, pages of material earlier referred to and described herein were mailed to the local board "*to be considered* • • • in determining the registrant's classification"—and this after the board had again classified the registrant IV-D. In "determining the registrant's classification" the Local Board was informed *anonymously* to "consider" that the panel allegedly had reached the "conclusion that the registrant's attendance at the seminary has been motivated by the desire to secure a basis for exemption from training and service under the Selective Service Law". Is this too "merely an advisory recommendation"? And on July 29th does the request to "reopen and reconsider the classification of June 1st" (IV-D), and in so doing to consider the "confidential

statement" indicate "merely an advisory recommendation"? Surely the language and import thereof did not suggest a reopening and reconsideration for the purpose of again reaching a IV-D classification.

In the light of the above and similar situations contained in the file it seems fantastic to read that the local board exercised "an independent judgment in classifying the registrant" and that "formal determination of the registrant's classification must rest with the board itself or the appropriate appeal agency" (Government brief, pp. 23, 8).

POINT V.

Minor discrepancies should be disregarded. The background of the record as a whole did not justify the 1A reclassification.

As to the discrepancies upon which the Government relies to sustain the action of the Local Board, the entire background and the record as a whole is disregarded. In addition to a mass of certificates, etc. as to current activities, documentary evidence in the form of a graduation album shows that as far back as 1932, upon completion of his public school studies Horowitz had stated that his ambition in life was to be a rabbi. Upon his graduation from high school in 1936, the official year book of the DeWitt Clinton High School shows that his first vocational choice was the "rabbinate". The record in the Selective Service file is replete with evidence indicating that he was not only interested but actually engaged in continuous religious activities, engaged in compensatory activities only as a means of obtaining funds to fulfill his ambition to become a rabbi,—in some of which he acted as a cantor and for a year or more as an assistant to the Rabbi of his congregation.

Going back to the completion of his high school studies, he entered the College of the City of New York in 1936,

at which time he expressed his vocational choice as "(1) rabbi, (2) teacher" and the following year it appears that the order was reversed and records indicate that he placed "teacher" first and "rabbi" second.

After his IV-D classification of June 1st, 1944, the Chief of the Legal Bureau of City Selective Service Headquarters on July 29th wrote the Local Board calling attention to this fact *and this fact alone* stating that "In view of the importance of the question of intention in the present case (see our letter of June 5th), it is requested that the local board reopen and reconsider the registrant's classification of June 1st in the light of the additional information presented and advise this Headquarters of the action taken in the matter".

The June 5th letter contained the "Confidential" statement. Immediately following the July 29th letter, the Local Board changed the classification to 1A and it is that particular classification that is involved on this appeal.

As was said in *Young Len Gee* v. *Nagle*, 53 Fed. 2nd 448, at 449, where it appears that "to overcome the burden of proof established by the appellant, the government relies upon three discrepancies":

> "* * * The Board of Special Inquiry and the Secretary of Labor denied admission to the applicant on the ground that he had failed affirmatively to establish the claimed relationship to Young Ng., *and their decision was based on the development of certain discrepancies.* In order to determine whether the order of exclusion was arbitrary, we must first examine the background *of the record as a whole.*" (Our italics.)

And at page 450:

> *"It is not that we are substituting our judgment on the admitted evidence for that of the Board;* it is rather that the weight of evidence in support of the

> claimed relationship is so strong, and is supported by those imponderables of which the Board may take cognizance, that any failure to recognize the claimed relationship is a *purely capricious and arbitrary action on the part of the Board.*" (Our italics.)

The Board in that case was specifically authorized and created by statute,—not one, as here, for which there is no legal authority for its existence,—despite which it assumes authority and functions not sanctioned by law.

As we have just pointed out, the July 29th letter stated "In view of the importance of the *question of intention* in the present case", etc. In this connection may we refer to the opinion expressed by District Judge Meaney who in dismissing the writ said:

> "*I don't care about his actual intention,* because I am not going into that • • •. I am willing to admit • • • that it (local board) did show indecision • • • the board was uncertain, it finally did arrive at a determination." (Our italics.)

As to the merits, the first statement is highly significant because under the statute and the decisions the "*intention*" of the registrant *is of primary importance.* As to the local board's decision being "final", this conclusion has been unanimously rejected by the courts.

As to the "indecision" and "uncertainty" shown by the local board,—the above recital indicates clearly what brought it about. Each time that it had made up its mind that the registrant was entitled to a IV-D classification its mind was changed by communications, etc. from the Chief of the Legal Division at New York City Headquarters.

We fully realize that as far as the written evidence is concerned, it does not appear that City Selective Service

Headquarters literally asked the Board to "change" its decision, nor did it, in language, "order" a change of the decision. Much has been said by the government to the effect that the final decision was left to the Local Board, but in each instance the written word shows opinions, arguments and innuendo presented, followed by a "request" to reopen and reconsider the classification. The words may not have been used, but the desire was expressed and the order naturally implied therefrom.

POINT VI

An appeal taken to and decision by an appeal board does not preclude a review of the classification.

It has been previously urged as is here *suggested* at page 30 of the government's brief that a decision by the appeal board, precludes review of a classification made by the Local Board. The cases are unanimous in holding that as a condition for the issuance of a writ of habeas corpus under the Selective Service Law the registrant must exhaust all of his "administrative remedies".

If the government's contention were correct, a registrant who did not appeal to the Appeal Board could not obtain a writ of habeas corpus because he had not exhausted his "administrative remedies". If he does exhaust his "administrative remedies" by taking such appeal, the decision thereon would result in the classification being "final" and not reviewable by the courts,—a result which this and other courts have repudiated—but one which the government has sought to obtain.

Irrespective of the propriety of the consideration of the "confidential" statement for the record by the Local Board, it was in violation of the Selective Service Law for the same to have been contained in the file sent to the Appeal Board.

Section 627.13, subdivision (b) thereof, provides for a summary which the local board is to prepare in conjunction with forwarding the registrant's file to the said Appeal Board. The last sentence of that section provides:

> "In preparing such a summary, the local board should be careful to avoid the expression of *any opinion* concerning information in the registrant's file and should refrain from including *any argument* in support of its decision." (Our italics.)

The same fundamental rules of law with respect to so-called "Confidential" communications which apply to the local board apply equally of course to the appeal board. Even though the statement were not a confidential one and had been open and available to the registrant, it contained "opinion concerning information in the registrant's file" and "arguments in support of its decision". In addition letters from the Chief of the Legal Division to the local board which were in the file strongly expressed the opinion that there were "inconsistencies" in the registrant's papers,—and together with other opinions and arguments, the board was "requested" to reopen and reconsider the IV-D classification of the registrant.

POINT VII

The names appearing under Appendix C of the government's brief, purporting to be those of panel members should not be considered.

No such list was in the registrant's file, respondent had no knowledge of the same; it was not produced in Court, is not contained in the record herein, and, we most respectively suggest, it should not, for these reasons, be considered on this appeal. The writer fully realizes that there are a number of prominent names in the list and

appreciates the import of the descriptive material employed in connection therewith.

How many are or ever were active members of the panel does not appear. Whether or not the activities of the panel were presided over by only two or three "regulars" does not appear. Not one of them ever signed his name to a recommendation in these cases; every one of them wanted his name kept secret; not one has appeared in Court in any of these cases to uphold or justify the recommendation made, opinions expressed or argument urged, though challenged in open Court to do so,—and that *if* responsible for the "Confidential Statement for the Record" *their failure and refusal* to sign the same and their violation of the statute in permitting it to be marked "Confidential" should, at least, make much less valuable the importance which might ordinarily attach to their names and positions.

The reason for the appendix seems clear. Fighting for years to keep their names "concealed" and employing every means available to City Selective Service Headquarters and government attorneys to do so; reacting to the rebuke of a United States District Court Judge,—"If these men are willing to serve, they ought to be willing to stand up and be counted. That is our American method."; successfully hiding in anonymity while the war was on,—and now that the war is over for more than a year, we find their names disclosed for the first time. And it would be interesting to know if, at long last, they really gave their consent to the use of their names, or whether the informant of the Solicitor General just supplied them.

After all, the list of names for the entire panel was never too important. It was the names of the two, three or more who sat on individual cases which was. That was *never* possible to obtain, and we feel certain that this

unauthorized, unwarranted and belated action in now furnishing the alleged entire list will not serve the purpose sought to be achieved by the government.

POINT VIII

U. S. ex rel. Goodman v. _Hearn_ and other cases relied upon by the Government do not follow the recognized rules of law and are not controlling.

The Government throughout its brief refers to and urges *United States ex rel. Goodman* v. *Hearn*, 153 Fed. (2d) 186 (Fifth Circuit) as an authority for its contentions and conclusions. The Learned Court which decided that case had very shortly before rendered a decision and wrote an opinion in the case of *Harris* v. *Ross*, 146 Fed. (2d) 355. On the hearing of the writ as well as on the appeal to the Circuit Court in the *Goodman* case, the *Harris* case was most strongly urged as authority by the Government to sustain the dismissal of the writ by the lower Court. It was there held that the inductee failed "to carry the burden of proof to support his claim before the Local Board" because "The Local Board is not a court that must swear witnesses, allow representation by counsel, and act only on the evidence presented" (p. 358). The opinion then recites that:

> "* * * The Local Board had the power and duty to determine from the evidence in the record, from proofs produced, *and from the extrinsic facts within the knowledge of the board, whether in evidence or not. In the absence of such facts as were within the knowledge of the board, but which are not in the record here,* this Court would be in no position to review the decision of the board on the facts even if the Court had the right to review actions which are committed to the discretion of the board." (Our italics.)

In commenting thereon, Goodman in his brief urged:

"We most respectfully further submit that if this be so, then *every* decision of a local board could be held to be absolutely final, without the right of review by the court, because the same situation could be said to prevail with respect to the members of every local board. * * * If the decision of the local board may be based upon 'knowledge or facts in the possession of its members but which are not in evidence' how would it ever be possible for a court to determine that a 'board' acted in a 'capricious manner', etc.?"

"Section 623.2 of the regulations provides:

'Oral information should not be considered unless it is summarized in writing and the summary placed in the registrant's file. *Under no circumstances should the Local Board rely upon information received by a member personally unless such information is reduced to writing and placed in the registrant's file.*'" (Our italics.)

"Let us eliminate this regulation, and again appellee's complaint regarding the absence of United States Supreme Court authorities may be further minimized by reference to *Interstate Commerce Commission* v. *Louisville & Nashville Railroad*, 227 U. S. 88, where, at page 93, it was held:

'* * * Manifestly there is *no hearing* when the party does not know what evidence is offered or considered, and is not given an opportunity to test, explain, or refute.'

'* * * The Commission *is not limited by the strict rules as to the admissibility of evidence*, which prevail in suits between private parties. * * * But the more *liberal* the practice in admitting tes-

timony, *the more imperative* the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the commissioners *cannot act upon their own information as could jurors in primitive days.* • • • In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, *the manifest deficiency could always be explained* on the theory that the commission had before it *extraneous, unknown* but presumptively sufficient information to support the finding.'" (Our italics.)

"In *Downey* v. *United States,* 91 Fed. (2d) 223, the Court following *Interstate Commerce Commission* v. *Louisville & Nashville R. R.,* said at page 231:

'The law puts no premium upon form for form's sake, but upon form as a safeguard to fair and dependable hearing and review, it properly lays great weight.'

And in following Interstate Commerce Commission v. Louisville & N. R. R., supra 'where, speaking through Mr. Justice Lamar, the court, *though recognizing that the Commission—unlike a Court—is not limited to the strict rules of evidence* • • • forbade the Commissioners to 'act upon their own information as could jurors in primitive days.'"

There were a number of other authorities also submitted.

Whatever the reasons therefor, suffice it to say that when the decision in the *Goodman* case affirmed that of the lower Court, *the Harris case was not even mentioned.* In part, the opinion practically adopts the view that the registrant having been given a hearing and the rules and procedure having been followed, that the decision

is final; and it directly rejects the decision of *United States ex rel. Levy* v. *Cain* (Second Circuit), *supra*, and those of the Third Circuit in the instant cases, without offering any basic legal reasons therefor. Many of the important reasons and grounds for the appeal urged by the registrant were not passed upon or even mentioned.

The opinion does not even seek to justify the creation of the panel as does the Government herein, by urging that it was proper to do so "under rules" and regulations prescribed by the President", etc. (Gov. Brief, p. 22). It appears that the learned Court was content to dispose of that question by admitting that though it is "not authorized by statute or regulation", it "*seems* to have been set up by Selective Service Headquarters for New York City, to give the local boards * * * advice, etc." (p. 220).

We most respectfully submit that this is no answer to the questions involved. Irrespective of its purposes, and assuming that they are as well intentioned as suggested in the opinion, the question still remains,—Was there any authority for the creation and operation of the Panel itself?,—a Panel governed by no rules, having unlimited powers and indulging in practices, as the evidence here indicates, in violation of some of the fundamental principles of law and justice.

It seems clear that its own very recent decision in *Harris* v. *Ross*, upon which the government "rested so heavily" and which permitted "the local board" to classify registrants on "*such facts as were within the knowledge of the board but which are not in the record here*", was abandoned because of its conflict with the decisions of this Honorable Court which were submitted by Goodman; and its opinion in the *Goodman* case, while not so clearly and glaringly erroneous, has no foundation in law or in fact and does not even cite one authority to support it.

As for its holding, as the government states at page 43, of its brief, "that if inquiry had been made" (for names of the panel members) "the information would have been forthcoming", that has been effectively and conclusively disposed of at pages 11-17 of this brief.

At page 31 of its brief, the government states:

> "We agree with the Circuit Court of Appeals for the Fifth Circuit (*United States ex rel. Goodman* v. *Hearn*, 153 F. 2d 186 (writ of certiorari dismissed pursuant to stipulation)), that this fact by itself does not permit the conclusion that the boards of appeal abdicated their statutory function."

This statement might indicate that the merits of the question were involved. The fact is that the motion for a writ of certiorari was granted and while the appeal was being prepared to this Court it developed that Goodman was about to be discharged from the army. If discharged, the question would have become moot, and it was for this reason, and *for this reason alone* that the government and registrant's counsel entered into the stipulation referred to.

In the *Isseroff* case, also urged by the government, the names of the panel members were *first* made known *at the hearing on the writ of habeas corpus.* The opinion in that case was in large part based upon the fact that the word "final" in the statute did not permit decisions of the local board to be reviewed by the courts. It was in that case that the statement was made that the government in the past was most desirous of *not* disclosing the names of the panel members.

An appeal in that case was taken to the United States Circuit Court of Appeals for the Second Circuit, but there too, the registrant was to be discharged from the army before the appeal could be heard and the appeal was withdrawn by stipulation.

The government repeatedly refers to *Trainin* v. *Coin*, 144 Fed. (2d) 944, suggesting that its holding is contrary to that in the Levy case. First of all, both cases were decided by the same Court (Second Circuit) and the Levy case was *subsequent* in point of time to the Trainin case. The real question in the former was whether or not there was *substantial* evidence to justify the 1A classification.

At page 947 of the Trainin opinion, it appears that "there was ample justification for the board's action". Among other elements, it appeared that when Trainin first registered for Selective Service he was a student at Brooklyn College. "Although shortly thereafter he entered St. John's Law School, * * * he stated in his selective service questionnaire in July, 1941, that he was a regular and duly ordained rabbi of the Hebrew Orthodox faith." He was placed in class IV-D. He *continued* the study of law until January, 1943; took and passed his Bar examination, and served as a clerk in a law office. As a result of anonymous complaints an investigation followed and he was reclassified 1A. He had "never attended any seminary in order to become a rabbi". In his questionnaire he swore that he was ordained "on June 1, 1938, and had commenced rabbinical practices around January 1, 1939". "He presented to his local board two certificates of ordination" both dated "June, 1940". In his occupational questionnaire he stated that he had been a rabbi since March, 1937", but before the panel "he stated that he had been ordained and had become a rabbi only in April, 1940". He then "returned to Selective Service Headquarters and presented a third certificate of ordination, issued under date of June, 1939, by his father." There seems to be no need to go further. The Court at page 949 said:

> "* * * what testimony and proof he did offer * * * was fairly well discredited upon cross examination. Further, most of his interest seems to have been in

the law, not the rabbinate. * * * Relator does not make out a very savory case; his story about the date of his ordination shifted with virtually each occasion that he was called upon to give it; and whenever his chances of exemption began to look a little dark, he seemed able to produce a new certificate of ordination that he 'had forgotten all about'."

The Government also urged the *Trainin* case in its brief on the Levy appeal, and we submit a portion of the reference made by the appellant Levy with respect thereto, and as contained in his brief, in support of his contention that no *actual holding* had been made supporting the restrictive rule (decision of Local Board is final) urged by the government:

"* * * this Honorable Court, after referring to the rules and standards applied in different authorities, stated that the question remains 'not thoroughly settled' and seemed *inclined* toward the view,—*though we most respectfully submit it was not so directly held*,—of applying 'the test of whether the Local Board had any evidence before it to sustain its result'" (Levy Brief, p. 20).

The opinion which followed in the Levy case and in the decisions of the courts below in this case negated the government's contentions.

In the *Goodstein* case, urged by the government, among other things, the Chairman of the local board actually appeared and testified. In the *Yarsolowitz* case,—*Harris* v. *Ross* was relied upon, and in the *Sullivan* case it appeared that there was a regulation which provided:

"Use of boards and information in their possession—Local Boards should utilize the services of the United States Department of Agriculture, County War Boards, in securing necessary current information as to agricultural activities of registrants."

There is not a single authority cited in the Government's brief which supports the contentions of the Government.

The language of the lower court in *U. S. ex rel. Rubin v. McGrader, supra,* might well be applied here:

> "The travel of this case indicates that the local board had a difficult decision to make and I am convinced that the local board was undoubtedly influenced by the advisory opinion of the theological panel."

In its Findings the Court stated that the registrant's

> "classification was made in the teeth of all the substantial evidence before the local board and the appeal board". and "the registrant's change of classification from 4D to 1A was an arbitrary, capricious and illegal act on the part of the local board".

The Samuels Case

As a question of law the *Samuels* case differs from the *Horowitz* case in that the "Statement for the Record" is not marked confidential. The record fails to show whether or not Samuels ever saw or knew the contents of the same. However, whether or not he did might be gleaned from the documentary evidence in his local board file.

After the 1A classification he sent a communication to the local board under date of October 4, 1944 in which, among other things, he stated:

> "The *transcript* from the panel contains so many errors. * * *" and "I have only recently had the opportunity to copy down the *transcript* * * *." (Italics ours.)

On his appeal from the 1A classification under date of October 23, 1944 he prepared a "Statement on Appeal".

In that statement there appears among other things:

> "There was a communication in the form of a letter from headquarters stating that the panel did not think I belonged in IV-D. I read in the file the *transcript* from the panel. There is absolutely nothing in there showing why the panel thought I don't belong in IV-D—but it does contain numerous errors and omissions. The local board * * * took the position that they follow the panel's recommendation."

Both of these communications refer solely to the transcript of the examination before the panel. He made a copy of that examination. There is absolutely no reference to the "statement for the record." Both of his statements urge that there was nothing new before the local board. If he saw or was permitted to read the statement for the record with its damaging, prejudicial and gratuitious opinions, is it not fair to assume that the "statement for the record" ~~was not in the file~~ would have remained to? Isn't it fair to assume that he was not afforded "the opportunity to copy down" the "statement for the record"?

Even the Government in its brief does not claim that he did, merely stating "that he examined the panel's *recommendation* and replied to it" (p. 29). (Italics ours.)

Whether or not he saw it, the opinions and arguments contained therein are similar (excepting the factual situation) to those contained in the *Horowitz* case.

Again every statement, opinion and argument contained in the "statement for the record" in the *Levy* case (Levy Record, pp. 111-113), is identical with that in the *Samuels* case. In the latter, however, there is *additional* argumentative material.

As to the facts, some of them are even more reprehensible. In the first place Samuels would have "completed his course for the rabbinate * * * in June, 1945"

(R. 42). "They told me to come down at a certain evening and when I came there with Rabbi Quinn, the Clerk notified me that they reconsidered it without my presence two days previous * * *. There was a letter of induction. That was their statement" (R. 48).

Even at the hearing on the writ all efforts to obtain the names of those who comprised the panel were to no avail even though the United States Attorney had "the Selective Service man next to" him (R. 51, 52).

"I was told by the local board at the hearing that the bringing of letters has no value whatsoever." (R. 47)

Incorporating herein the references heretofore made with respect to the failure of the government to call *any* witness with respect to the claims and contentions made by the registrant, the record here contains a statement affirmatively corroborating this last quoted testimony. In the registrant's local board file will be found a "local board memorandum" dated November 9th, 1944 in which Mr. White of the local board commenting on the written evidence submitted by the registrant stated:

> "* * * These letters * * * were received *more or less* as a courtesy."

The Union of Orthodox Rabbis of the United States and Canada is, as the name indicates, an international organization and recognized as the outstanding orthodox body of its kind. Its committee had examined Samuels and found him to be a qualified rabbinical student intending in good faith to become a rabbi and so recommended.

The same Mr. White continues in the said memorandum to state that he felt that the Selective Service panel was "unbiased" and that the Union of Orthodox Rabbis of the United States and Canada was not.

It also appears that the final decision of the local board was by a divided vote,—2 to 1.

The Appeal should be dismissed as the cause is moot.

After the decisions of the Circuit Court herein, orders were entered in the District Court with respect to the status and disposition of each inductee. It was provided therein that they be discharged and *released from custody* without prejudice to further lawful proceedings under the Selective Service Act; but in the Horowitz case, it was further ordered that such release be conditioned upon his furnishing " * * * the amount of Five Hundred ($500.00) Dollars, for his appearance to answer and abide by the judgment in any appellate proceeding that may be instituted by the respondent in this cause." Such provision is not present in the order releasing Samuels, it being there

> "ORDERED that the said General Madison Pierson or any other Commanding Officer at Ft. Dix, New Jersey or any other Commanding Officer at any station or installation of the United States Armed Forces within the District of New Jersey, or wherever situate, or wherever the said *Jacob S. Samuels* is now held in custody or any other officer, agent or representative of said Armed Forces, be and the same are hereby *ordered and directed to forthwith discharge the said Jacob S. Samuels, the relator herein from such custody,* and it is further
>
> ORDERED that the discharge of the relator from such custody is without prejudice to further lawful proceedings under the Selective Service Act in his case." (Our italics.)

In each case, the inductee was discharged and *released from the custody of the military authorities* subject only to new proceedings before his local Selective Service Board, which proceedings *might* again lead to his induction.

In *Innes* v. *Crystal*, 319 U. S. 755; 63 S. Ct. 1164, it appeared that the relator was removed from the custody of

the Army to a Federal Penitentiary in a different district and circuit. In *Weber* v. *Squire*, 315 U. S. 810; 62 S. Ct. 800; the petitioner had been released upon an order of the United States Board of Parole. In *Tornello* v. *Hudspeth*, 318 U. S. 792; 63 S. Ct. 990, the petitioner had been pardoned by the President. (See also *Zimmerman* v. *Walker*, 319 U. S. 744; 63 S. Ct. 1027.)

In each of these cases it was held that the person had been discharged and released from custody, and, not being in the lawful custody of anyone, the cause was moot.

The absence of the "recognizance" provision in the Samuels order was not due to any oversight. On April 11, 1946 Honorable J. Howard McGrath, Solicitor General, who appears for the Government herein, sent a letter to and which was received by the writer of this brief, part of which is as follows:

> "Re: Pearson v. U. S. ex rel. Samuels, No. 948, Supreme Court of the United States
>
> Dear Mr. Kreeger:
>
> This will acknowledge your letter of April 9 regarding the above-entitled case.
>
> I have looked into the matter and I find that, as you say, you were advised by the Assistant United States Attorney handling the appeal that the Government would not petition for a writ of certiorari to review the decision of the Circuit Court of Appeals; and that, relying upon that representation, you caused the mandate to be entered in the District Court with the approval of the United States Attorney. The result was that Samuels was released from military custody. Your position is that these facts foreclose the government from seeking Supreme Court review of the case, both on legal and moral grounds, and you suggest that the Government should not proceed further.

> While, of course, I regret that you were unintentionally misled as to the Government's position, I cannot agree that the facts which you present foreclose the United States from now petitioning the Supreme Court for certiorari to review the case. I am, therefore, unable to take action dropping the case."

The balance of the letter contains the reasons stated by the Solicitor General in support of the position taken by him and he refers to the case of *Carr* v. *Zaja*, 283 U. S. 252, as legal authority therefor.

Irrespective of the propriety of the reasons urged or the applicability of the authority referred to, they do not affect the legal question here involved. It is elementary that the basis for a writ of habeas corpus is the question of "custody". In the instant case the fact is, as the Solicitor General himself so aptly points out in his letter,—*"The result"* (of the signing and filing of the order) *"was that Samuels was released from military custody."*

No reason, "legal or moral", can change that fact, and it is most respectfully submitted that there is no question remaining which this Honorable Court is called upon to decide.

Horowitz' status.

The writer freely admits that absent the "recognizance" provision in the order releasing Horowitz from custody, the United States Attorney *might* not have consented to his release, but it does not follow that he would not have been otherwise released. If this consent order had not been signed and filed, the United States Attorney would have been compelled to apply to the Circuit Court for a stay which might or might not have been granted.

However, since then, he has read some of the decisions with respect to bail cases on writs of habeas corpus, and

in view of the similarity of the pertinent facts, he feels that he would be derelict in his duty, both to this Honorable Court and to his client, if he did not submit the same herein.

In *Johnson* v. *Hoy*, 227 U. S. 245, 33 S. Ct. 240, Johnson arrested under an indictment, applied for a writ of habeas corpus. After a hearing the same was dismissed. He was subsequently released on bail pending an appeal from that decision and the Court held at page 241:

> "Since the appeal, he has given bond in the district court, and has been released from arrest under the warrant issued on the indictment. He is no longer in the custody of the marshal to whom the writ is addressed, and from whose custody he seeks to be discharged. * * * The appeal must be dismissed."

See also *Van Meter* v. *Sanford*, 99 Fed. (2d) 511, and cases there cited.

Though it is true that these authorities held the causes moot at the request of the Government on appeals taken by those who had been in custody, the same rule should apply here because the *sole* basis for these decisions is that "No one has his body in custody, or could lawfully arrest him by virtue of his parole status so long as he observes its conditions", and "* * * He has given bond in the district court, and has been released from arrest under the warrant issued on the indictment."

Neither Samuels or Horowitz is in the custody of anyone. Both are now in civilian clothes, attending classes at rabbinical seminaries in New York City, free to come and go as each may desire,—all of which is known to the Government, and information regarding which has been communicated to their local boards, and is undoubtedly contained in their respective files.

Conclusion

In addition to the illegality of the creation of the panel and the panel itself, its unauthorized and unwarranted acts, as well as those of City Selective Service Headquarters, in connection therewith—an examination of the background of the records as a whole discloses that both registrants were entitled to a IV-D classification.

Respectfully submitted,

MEYER KREEGER,
Attorney for Respondents.

SUPREME COURT OF THE UNITED STATES

No. 58.—October Term, 1946.

Major General W. W. Eagles, Post Commanding Officer, Fort Dix, New Jersey, Petitioner, v. United States ex rel. Harry Horowitz.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[December 23, 1946.]

Mr. Justice Douglas delivered the opinion of the Court.

This is a companion case to *Eagles* v. *Samuels*, No. 59, decided this day, *ante* p. —. Certiorari also brings it here from the Third Circuit Court of Appeals. That court followed the same procedure here as it did in Samuels' case; it reversed the District Court which had dismissed the writ of *habeas corpus* brought on behalf of Horowitz, and remanded the cause to the District Court with directions to discharge him from military custody. 151 F. 2d 801.

It appears that after the remand Horowitz was enlarged upon a recognizance as permitted under our rules. Rule 45. The suggestion that the case is therefore moot is without merit for the reasons stated in Samuels' case.

Horowitz registered pursuant to the Selective Training and Service Act of 1940, as amended, early in 1941 and filed a questionnaire stating he was a college student preparing for a career as a psychiatric social worker. At the time he asked for a deferment in induction until February, 1943, saying that "if you take me now, you practically negate my possibilities to attain the position I seek in life, namely, a psychiatric social worker." Shortly after he was physically examined and found qualified for military service, he advised the local board that he had been en-

rolled in the Rabbinical Seminary of America, a recognized theological school. On July 1, 1941, he was classified I–A. The board of appeal likewise gave him that classification in August, 1941.

Meanwhile, he claimed exemption under § 5 (d) of the Act. The basis of his claim was the representation that he was a student in a recognized theological school for rabbis and was preparing for the rabbinate. In an affidavit he stated that he had not disclosed his intention to become a rabbi because he had no "concrete facts" to present, only "hopes". In November, 1941, the local board classified him IV–D which classification he retained until May, 1944. In 1942 he filed an occupational questionnaire with the local board stating that he was taking a course in rabbinical studies at the seminary and also a bachelor of social science course at another institution which he hoped to complete in 1944. He listed himself as a social worker.

In April, 1944, the city director of Selective Service reviewed the file and requested Horowitz to appear before an advisory theological panel. He appeared before a panel and there was a hearing. The panel stated that all students in this seminary were not necessarily preparing for the ministry and that each individual case should be separately appraised.[1] It concluded that his attendance at the seminary had been motivated by a desire to secure a basis for exemption under the Act. This was based

[1] The approach of the panel to the question is shown as follows in its statement:

> "Orthodox tradition has always encouraged advanced study of talmudic literature, both privately and at academies instituted for that purpose, irrespective of the specific occupational objective of those engaged in such study, and all courses offered by these academies are open to qualified students without regard to the individual student's specific intention to prepare for a career of service in the rabbinate.
>
> "Thus, a student ultimately intending to enter business or a profession, or some non-rabbinic activity in the field of religion, may be enrolled in the same courses attended by other students who are specifically concerned with preparation for the rabbinate.

on his declared intention early in 1941 to be a social worker, inconsistencies in his explanation of his failure to refer to the rabbinate at that time, his indifferent and unsystematic manner in preparing for that professed objective, and an appraisal of his reliability and candor. The transcript of proceedings before the panel and later the report were transmitted to the local board by the office of the city director of Selective Service with a request to the board to reopen and reconsider his classification. The report made by the panel was not signed. Moreover, the report was headed "Confidential Statement for the Record." The local board was advised by the city director's office that while it should give careful consideration to the recommendation of the panel, determination of the classification must be made by the board itself or by an appeal agency.

Horowitz was immediately reclassified as I–A. He asked for a hearing which was granted. It appears that the panel which interviewed him and rendered the report was composed of three prominent Jewish laymen but no rabbi. Whether that was the cause does not appear, but the board, as a result of the hearing, referred the file to a rabbi for another advisory recommendation. The rabbi recommended that Horowitz be classified IV–D. The local board gave him that classification in June, 1944. In August, 1944, the local board held another hearing.

It is, therefore, essential for purposes of Selective Service classification to determine in each individual case the purpose which the registrant has in mind in pursuing his course of study.

"Moreover, the fact that the religious tradition in question does not attempt to distinguish between the serious student of talmudic literature and the student preparing for a professional career in the rabbinate, tends to make it extremely difficult for school officials, ministers, and others identified with that tradition, to have and express an objective judgment in such matters.

"To the extent that the distinction is understood, there is a tendency to accept at face value assertions made by the registrant and members of his family and to resolve any doubt in his favor, where it is at least apparent that he is a serious and pious talmudic student."

Horowitz was present and was examined. The board concluded that he should be in I–A and so classified him, stating as its reason that he became a student in the rabbinical school after he had registered under the Act. He requested and was granted another hearing, at which he submitted additional evidence. The local board refused to change the classification. On appeal the board of appeal classified him as I–A.

On two subsequent occasions Horowitz asked that his classification be reopened and submitted additional evidence. The board was unpersuaded and refused to reopen the classification. The office of the city director advised the boards that the panel which interviewed Horowitz had been composed solely of laymen and that if by virtue of that fact the board of appeal desired to reconsider the case, to inform the office. Both the local board and the board of appeal replied that there was no occasion for reopening the classification. The board of appeal stated that it had "once again unanimously agreed that the registrant's status does not warrant a IV–D classification." Early in 1945 Horowitz was inducted into the Army.

Horowitz relies upon affidavits and statements from various people concerning the *bona fides* of his professed desire to become a rabbi, on a statement made when he graduated from the public schools in 1932 that that was his ambition in life, on the fact that he stated in 1936 that his first vocational choice was the rabbinate, and on all of his subsequent activities which, he asserted, fitted into that pattern. On the other hand, it does appear that in 1937 his first vocational choice was teaching, his second the rabbinate. Furthermore, as already noted, his professed objective stated to the local board early in 1941 was social work. And he in fact entered the seminary shortly after he had passed his physical examination and qualified for military service. These circumstances alone

make his claim to exemption colorable. Certainly we cannot say that the action of the board of appeal in finally classifying him as I–A was without any support in the evidence.

The question remains whether there was anything in the administrative procedure which vitiated Horowitz' classification. What we have said about the use of a theological panel and the range of its inquiry in *Eagles* v. *Samuels, supra*, need not be repeated here. There is nothing in the present case which makes for a different result. We can no more conclude here, than in Samuels' case, that the board abdicated its function. It first followed the panel's recommendation. But its mind was not closed, as evidenced by the fact that it later sought the advice of a rabbi and followed his recommendation. And when it returned to its earlier position, it proceeded on the ground that the basic defect in Horowitz' case was the shift in his position in 1941 after he had registered. The record shows indecision by the board but no subservience to the panel. As respects the fact that the panel's report was unsigned, only a word need be added. Horowitz, like Samuels, appeared in person before the panel and saw its members face to face. At no time does it appear that he sought the identity of the members and was refused the information.

The essential procedural differences between this case and Samuels' are two—it appears that this panel was composed entirely of laymen; and its report was not only unsigned but marked confidential for the file. The first objection carries little weight. These laymen were prominent citizens of the Jewish faith. There is no showing that they were of a sect hostile to Horowitz. There is nothing to impeach their integrity or to suggest that they were not qualified to serve in the expert role assigned to them.

The fact that their report was marked confidential is given great emphasis. It is argued that although the use

of a theological panel may be authorized, there is no warrant for clothing its action in such secrecy.

The regulations, indeed, prescribe that no information in a registrant's file shall be confidential as to him or any one having written authority from him. Section 605.32 (a), 8 Fed. Reg. 2641, 9 Fed. Reg. 9190. But the difficulty here is that it is not shown that the panel's report was in fact treated as confidential by the local board. It is not shown that Horowitz sought and was denied access to the report. Nor is it shown that when Horowitz examined the file the report was not made available to him. If those were the facts, we do not doubt that Horowitz' counsel would have established them at the *habeas corpus* hearing. We find no command to the local board to keep the report confidential. We cannot presume that the board violated the regulations. Yet that is in effect what we are asked to hold. Horowitz, like Samuels, points to possibilities of abuse in the use of the panel. But like Samuels he fails to establish prejudice in his case. The judgment below must therefore be

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 59.—October Term, 1946.

Major General W. W. Eagles, Post Commanding Officer, Fort Dix, New Jersey, Petitioner, *v.* United States ex rel. Jacob S. Samuels.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[December 23, 1946.]

Mr. Justice Douglas delivered the opinion of the Court.

Samuels registered under the Selective Training and Service Act of 1940,[1] as amended, and thereafter claimed exemption from military service under § 5 (d) of the Act. That exemption includes not only regular or duly ordained ministers of religion but also "students who are preparing for the ministry in theological or divinity schools recognized as such for more than one year prior" to the Act. He was classified I–A and inducted into the Army. Thereafter he filed a petition for a writ of *habeas corpus* in the District Court, seeking release from military custody on the ground that he was entitled to an exemption under § 5 (d) of the Act and that his classification as I–A was unlawful. There was a return and a hearing, and the District Court ordered the writ dismissed. On appeal the Circuit Court of Appeals, in reliance on *United States v. Cain*, 149 F. 2d 338, reversed and remanded the cause to the District Court with directions to "discharge" Samuels "from military custody, without prejudice to further

[1] 54 Stat. 885, 55 Stat. 211, 621, 845, 56 Stat. 386, 50 U. S. C. App., 50 U. S. C. App. Supp. I, and 50 U. S. C. App. Supp. II, § 301 *et seq.* Our citations of the Act and the regulations throughout the opinion refer to the provisions applicable at the times relevant here.

lawful proceedings under the Selective Service Act". 151 F. 2d 801, 802.

The case is here on a petition for a writ of certiorari which we granted in order to resolve the conflict between the decision below and *United States* v. *Hearn*, 153 F. 2d 186, in the Fifth Circuit Court of Appeals.

First. A question of mootness lies at the threshold of the case presented here. We are advised that after remand of the cause the District Court ordered the release of Samuels and that he was thereupon unconditionally released from military custody. Samuels contends that the case is moot since he is no longer in custody of the military or of any one else but is free to come and go as he pleases.

Under our decisions the case would be moot if the writ of *habeas corpus* had been denied below and, pending disposition of the petition here, Samuels had received a discharge from the army. *Zimmerman* v. *Walker*, 319 U. S. 744. And see *Weber* v. *Squier*, 315 U. S. 810; *Tornello* v. *Hudspeth*, 318 U. S. 792. That situation, like the case of a prisoner who, pending an appeal from denial of a writ of *habeas corpus*, is granted bail, *Johnson* v. *Hoy*, 227 U. S. 245; *Wales* v. *Whitney*, 114 U. S. 564, 572-574, would present no existing controversy. *Habeas corpus* is the means of making a judicial "inquiry into the cause of restraint of liberty." R. S. § 752, 28 U. S. C. § 452. As stated in *McNally* v. *Hill*, 293 U. S. 131, 137, "There is no warrant in either the statute or the writ for its use to invoke judicial determination of questions which could not affect the lawfulness of the custody and detention". If the custody or restraint of liberty is terminated without use of the writ, the case is finished. Different considerations are brought into play if custody is ended through the writ itself.

Our rules recognize the beneficent function of the writ, *Bowen* v. *Johnston*, 306 U. S. 19, 26-27; *People* v. *Jen-*

nings, 246 N. Y. 258, 158 N. E. 613[2] by providing that a prisoner to whom the writ has been granted may, pending appeal, be enlarged on a recognizance. Rule 45. The fact that he has been so enlarged does not render the appeal of the custodian moot. *Carr* v. *Zaja*, 283 U. S. 52, 53.[3] In such a case the release is obtained through the assertion of judicial power. It is the propriety of the exercise of that power which is in issue in the appellate court, whether the prisoner is discharged or remanded to custody. Though the writ has been granted and the prisoner released, the appellate court by what it does is not rendering an opinion and issuing an order which cannot affect the litigants in the case before it. Cf. *St. Pierre* v. *United States*, 319 U. S. 41, 42, and cases cited. Affirmance makes the prisoner's release final and unconditional. Reversal undoes what the *habeas corpus* court did and makes lawful a resumption of the custody. *Knewel* v. *Egan*, 268 U. S. 442, 448; *Haddox* v. *Richardson*, 168 Fed. 635; *James* v. *Amrine*, 157 Kan. 397, 140 P. (2d) 362; *State* v. *Langum*, 135 Minn. 320, 160 N. W. 858.

Second. On the merits the case involves primarily the use by the Selective Service System in New York City of advisory panels on theological classifications. Under the Act the President is authorized to establish "civilian local boards, civilian appeal boards, and such other agencies, including agencies of appeal, as may be necessary to carry out the provisions of this Act." Section 10 (a) (2), 57 Stat. 597, 598, 50 U. S. C. App. Supp. III, § 310 (a) (2). With

[2] In that case Mr. Justice Cardozo, then Chief Judge of the New York Court of Appeals, said, "It would be intolerable that a custodian adjudged to be at fault, placed by the judgment of the court in the position of a wrongdoer, should automatically, by a mere notice of appeal, prolong the term of imprisonment, and frustrate the operation of the historic writ of liberty." 246 N. Y. p. 260.

[3] It appears from the briefs in that case that after the writ had issued in the lower court the petitioner had been discharged, pending appeal, on a recognizance.

exceptions not material here, the President is authorized to delegate to the Director of Selective Service any authority vested in him under the Act. Section 10 (b), 57 Stat. 597, 598, 50 U. S. C. App. Supp. III, § 310 (b). And the Director may redelegate that authority, *Id.* The administration of the system in each State is delegated under the regulations to a state director. Sections 603.11, 603.12, 6 Fed. Reg. 6827. In New York City, however, a city director has been appointed who performs within that area the functions of the state director. Section 603.12–1, 8 Fed. Reg. 3514. The city director supervises the local boards and boards of appeal in New York City. He may require a local board to reopen and consider anew the classification of a registrant. Section 626.2 (b), 9 Fed. Reg. 11619, § 626.2–1, 10 Fed. Reg. 9210. He may appeal to a board of appeal any determination of a local board. Section 627.1, 8 Fed. Reg. 16720, 10 Fed. Reg. 9210. He may require a board of appeal to reconsider its decision, § 627.61, 8 Fed. Reg. 6017, or appeal from it to the President. Section 628.1, 7 Fed. Reg. 10521.

It appears that the city director, in aid of these functions, established theological panels. It was thought desirable to give the selective service personnel the benefit of the advice of those familiar with the educational practices of various religious groups so that Selective Service might exercise a more informed judgment in evaluating claims to classifications in IV–D. Accordingly, theological panels were constituted, one of which consisted of prominent laymen and rabbis of the Jewish faith who gave advisory opinions on those who sought a IV–D classification on the grounds that they were either rabbis or students preparing for the ministry in the Jewish religion. The members of the panel were volunteers, as permitted by the regulations. Section 602.2, 6 Fed. Reg. 6826. And pursuant to the regulations each took the oath of office. Section 602.4 (a), 6 Fed. Reg. 6826.

Samuels registered under the Act in February, 1942. In May and July, 1942, he filed with his local board questionnaires stating that he had had two years of high school education; that he was a student at the Mesifta Theological Seminary preparing for the rabbinate; that since 1940 his regular occupation was that of a clerk; that for the past two years he had been employed by a textile company; and that the job for which he was best fitted was that of a spiritual leader and a teacher of Hebrew or rabbinical duties. The local board was advised by the seminary that Samuels had attended there since he was six years old, that he had finished the eight year elementary course and the four year pre-rabbinical course, that he had been admitted to the rabbinical division in 1937, that he left the school in 1939 to seek employment, that he returned to the evening school in September, 1941, and that he was transferred to the day session in July, 1942, which as later appeared, was a few days before the school closed for the summer.

In August, 1942, the local board classified him IV–D. Section 622.44 (a), 6 Fed. Reg. 6607, 6766. In May, 1944, he was given a physical examination and found acceptable for military service. Thereafter the city director requested that he appear before the theological panel in respect to his claim to a IV–D classification. He appeared before the panel in June, 1944, stating, *inter alia*, that he expected to graduate from the seminary in 1945, that ill health caused him to leave the school in 1939, that between 1940 and 1942 he worked as a clerk, and that he returned to the seminary as a full time student at about the time he filed his selective service questionnaire.

The panel reported that the seminary which Samuels attended was not preparing men exclusively for the rabbinate, that orthodox tradition encouraged advanced study of the subjects in which students for the ministry were trained, and that students ultimately intending to enter

business or a profession or some non-rabbinic activity in the field of religion may be enrolled in the same classes as those preparing for the rabbinate. The panel stated that it therefore seemed essential to determine in each case what the registrant had in mind in pursuing his course of study; that to make that determination the character of the seminary, the sincerity of the registrant's declared purpose, his demeanor, and the impression as to his candor and honesty should be considered. It concluded that Samuels was not "preparing in good faith for a career of service in the practicing rabbinate." Its recommendation and the transcript of the hearing before it were sent to the city director who forwarded them to the local board with a request that Samuels' classification be reopened and with the statement that "while the Local Board should give careful consideration to the recommendation of the advisory panel, the responsibility of determining the registrant's classification must rest with the Local Board itself, or the appropriate agency of appeal."

The local board reclassified Samuels I–A in August, 1944. He submitted additional evidence and requested a hearing. One was had in September, 1944 and another in October, 1944. There is no showing that the recommendation of the panel or the transcript of the hearing before it was kept from Samuels. They were not marked confidential in the file. The local board, indeed, allowed Samuels to correct alleged inaccuracies in the transcript. The local board ordered him continued in I–A and on appeal, the board of appeal also classified him as I–A. A few days later Samuels filed additional information with the local board and requested that his classification be reopened. Another hearing was held, Samuels being present. He advised the board that he had appeared of his own volition before a committee representing the Union of Orthodox Rabbis (but not connected with the selective service system) and that the committee concluded he was a student

preparing in good faith for the ministry. What facts that committee may have acted upon do not appear. In any event, the local board denied Samuels' request to reopen the classification by a divided vote; and shortly thereafter he was inducted into the army.

Congress made the decisions of the local boards and of the boards of appeal "final", except as appeals from them may be authorized, § 10 (a) (2), withholding from the courts the customary power of review of administrative action. See *Estep* v. *United States*, 327 U. S. 114.

It is elementary that *habeas corpus* may not be used as a writ of error. *Tisi* v. *Tod*, 264 U. S. 131; *Woolsey* v. *Best*, 299 U. S. 1. The function of *habeas corpus* is exhausted when it is ascertained that the agency under whose order the petitioner is being held had jurisdiction to act. If the writ is to issue, mere error in the proceeding which resulted in the detention is not sufficient. *Tisi* v. *Tod*, *supra*. Deprivation of petitioner of basic and fundamental procedural safeguards, an assertion of power to act beyond the authority granted the agency, and action without evidence to support its order, are familiar examples of the showing which is necessary. See *Johnson* v. *Zerbst*, 304 U. S. 458; *Bridges* v. *Wixon*, 326 U. S. 135, 149. But it is not enough to show that the decision was wrong, *Tisi* v. *Tod*, *supra*, or that incompetent evidence was admitted and considered. *Vajtauer* v. *Commissioner*, 273 U. S. 103. If it cannot be said that there were procedural irregularities of such a nature or magnitude as to render the hearing unfair, *Bridges* v. *Wixon*, *supra*, p. 156, or that there was no evidence to support the order, *Vajtauer* v. *Commissioner*, *supra*, the inquiry is at an end.

We do not think that the use of the theological panel *per se* infected the whole administrative proceeding and rendered it so unfair as to be nugatory. The task of the local boards in evaluating claims to exemption is almost certain to raise perplexing problems, especially in large

centers where the status and activities of registrants are not so well known in the community. The local boards will frequently have to make inquiries on their own. And when it comes to exemptions claimed under § 5 (d), the variety of religious faiths and the differing educational practices of the churches or of sects within one faith may create difficult questions for the boards.

We agree with the court in *United States* v. *Hearn*, *supra*, p. 188, that advice from well-informed members of the faith in question may "both help and speed just classification". Congress wrote into the Act a comparable procedure for the handling of claims for exemption by conscientious objectors. Where such claims are denied by the local board and appealed, they are referred to the Department of Justice for a hearing and an advisory report. Section 5 (g). But the fact that there is no specific statutory provision for the creation of theological panels does not make their use improper. Wise administration may call for the expert advice which they alone can offer. And we see no difference in principle if they are formally constituted and regularly used in lieu of inquiry to members of the particular faith as individual cases arise. The administrative function entrusted to the Selective Service is an enormous one. The Act contemplates an administrative organization highly decentralized so as to operate effectively at the local level. More than the director, local boards, and boards of appeal were authorized. For § 10 (a) (2), as we have noted, authorized the creation of "other agencies" as well. A theological advisory panel, serving solely in an advisory capacity, would seem to be included in that category. The information received by the board from the panel, like information from any other source, must be put in writing in the file so that the registrant may examine it, explain or

correct it, or deny it.[4] There is, moreover, no confidential information which can be kept from the registrant under the regulations.[5] With those safeguards a truly expert panel might serve a most useful function without the administrative process being corrupted by any unfair procedure.

Distinct questions would be raised if a registrant of one faith were referred to a theological panel on which his faith was not represented. See *United States* v. *Balogh*, — F. 2d —, decided October 31, 1946. But it has not been shown that such a condition obtained here.

The court in *United States* v. *Cain*, *supra*, p. 341, held that though the propriety of the use of a theological panel be assumed, it must be limited by two conditions: the names of the members of the panel must be disclosed to the registrant so that he may be in a position to challenge it; the advice or answers which it gives must be limited to ecclesiastical questions.

In the statement which the panel filed in this case the names are not disclosed. But we do not think that fact rendered the administrative proceedings invalid *per se*. This is not a case of a registrant being passed upon by a secret group. He appeared before them, saw them face to face, and indeed recognized one of them. There is no showing that Samuels tried to ascertain who the panel members were, either at the time or subsequently, and was denied the information. Though we assume that the regulations require the file to disclose the names and affiliations of the panel members, the mere absence of a formal

[4] The regulations provide that in classifying a registrant, "Oral information should not be considered unless it is summarized in writing and the summary placed in the registrant's file. Under no circumstances should the local board rely upon information received by a member personally unless such information is reduced to writing and placed in the registrant's file." Section 623.2, 9 Fed. Reg. 437, 10 Fed. Reg. 8541.

[5] See § 605.32 (a), 9 Fed. Reg. 9190.

disclosure is not, without more, so grave an omission as to undermine the whole administrative proceeding.

The question is not whether the allegations of the petition are sufficient to justify the grant of the writ or the issuance of a rule to show cause, so that the facts can be ascertained in accord with the procedure outlined in *Walker* v. *Johnston*, 312 U. S. 275. In this case there was a return to the writ, a full hearing was had, and all evidence offered was received. Samuels had the burden of showing that he was unlawfully detained. *Walker* v. *Johnston*, *supra*. Not every procedural error, but only those so flagrant as to result in an unfair hearing render the proceedings vulnerable in a collateral attack. *Tisi* v. *Tod*, *supra*, p. 133; *Bridges* v. *Wixon*, *supra*, pp. 152–156. On the case Samuels has made out, the most that has been shown is that the use of the theological panel might result in a hearing so unfair as to deprive the administrative proceedings of vitality. Samuels has failed to show that in his case it had that effect. He has therefore failed to sustain the burden of proof which was on him.

Secrecy and anonymity are not congenial to our traditions of procedure, nor in keeping with the regulations under this Act. But as we have said, the range of inquiry in a *habeas corpus* proceeding is limited. We are not sitting in review of action of federal agencies over which we have the power of supervision. Cf. *McNabb* v. *United States*, 318 U. S. 332. The function of *habeas corpus* is not to correct a practice but only to ascertain whether the procedure complained of has resulted in an unlawful detention. It is the impact of the procedure on the person seeking the writ that is crucial. Whatever potentialities of abuse a particular procedure may have, the case is at an end if the challenged proceeding cannot be said to have been so corrupted as to have made it unfair. Samuels points to possibilities of abuse. But he fails to establish prejudice in his case.

If, as was held in *United States* v. *Cain*, *supra*, the panel must be restricted to answering ecclesiastical questions, Samuels should prevail. For the panel in question not only gave the board information concerning the seminary which Samuels attended but also rendered an advisory opinion on the *bona fides* of his claim. The argument for restricting the panel to ecclesiastical questions is based on the thought that it is only on such subjects that the board needs specialized information, while if the board relies on a general advisory opinion of the panel, it is devolving its administrative responsibility. *See United States* v. *Cain*, *supra*, pp. 341–342.

It is plain that the local boards and the boards of appeal may not abdicate their duty by delegating to others the responsibility for making classifications. That is their statutory function. Section 10 (a) (2). But no such case is made out in this record. The city director submitted the panel's report with the admonition that it was advisory only and that it was the board's responsibility to make the classification. The recommendation of the panel was followed. But Samuels was subsequently given not only one but two hearings before the local board and a hearing before the board of appeal. There is no indication that either board relied solely on the panel's report or considered itself bound by it. In fact both boards received additional evidence submitted by Samuels and considered it. The record does not bear out the suggestion that either board was a rubber stamp for the panel.

Nor do we think that the range of inquiry and recommendation of the panel was too broad. If a panel is truly expert in the field, its expertness is not necessarily limited to knowledge of the theological schools, the course of training, and the educational practices and traditions. Its acquaintance with the ministry of that faith and with the norms of the profession may well give it special insight into the claims of those seeking exemption. To draw the

line at questions technically ecclesiastical is to make a distinction which may be wholly arbitrary in terms of the panel's expertness. A panel might act on irrelevancies; it might usurp the functions of a board. We discover nothing of the kind here. The fact that the board follows the advice of the panel does not necessarily mean that it functions in a subservient way. The fact is that the local board and the board of appeal gave Samuels further hearings and received and considered all evidence submitted. We find no procedural error of such magnitude as to warrant an uprooting of the entire administrative proceeding in this collateral attack upon it.

Nor can we say there was no evidence to support the final classification made by the board of appeal. Samuels' statement that he was best fitted to be a Hebrew school teacher and spiritual leader, the two year interruption in his education, his return to the day session of the seminary in the month when his selective service questionnaire was returned, and the fact that the seminary in question was apparently not preparing men exclusively for the rabbinate make questionable his claim that he was preparing in good faith for the rabbinate. A registrant might seek a theological school as a refuge for the duration of the war. Congress did not create the exemption in § 5 (d) for him. There was some evidence that this was Samuels' plan; and that evidence, coupled with his demeanor and attitude, might have seemed more persuasive to the boards than it does in the cold record. Our inquiry is ended when we are unable to say that the board flouted the command of Congress in denying Samuels the exemption.

Reversed.